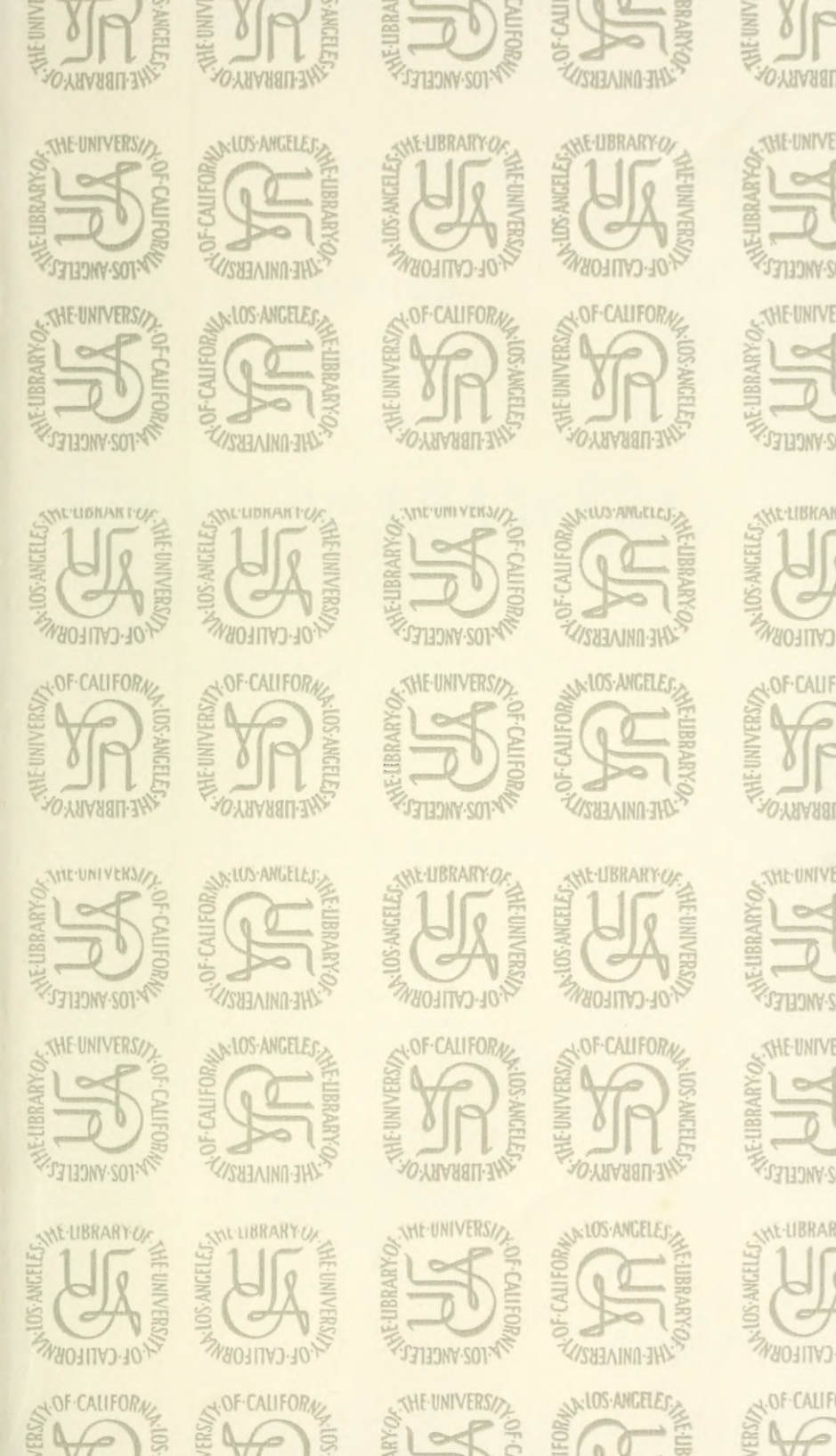
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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURT OF CHANCERY

OF THE

STATE OF MICHIGAN.

By HENRY N. WALKER.

SECOND EDITION, ANNOTATED BY

MARSHALL D. EWELL,

Professor in Union College of Law, Chicago, and Author of "A Treatise on the Law of Fixtures, Etc."

CHICAGO:

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TABLE

OF THE CASES REPORTED.

Albany City Bank *v.* Steevens... 6
——— *v.* Dorr..... 317
Attorney General *v.* Oakland County Bank..... 90

Bachelor *v.* Nelson 449
Bailey *v.* Murphy..... 305
——— *v.* ——— 424
——— *v.* Gould..... 478
——— (Gould *v.*)..... ”
Bank of Michigan *v.* Niles..... 99
——— *v.* ——— 398
——— (Chene *v.*)..... 511
Barstow *v.* Smith..... 394
Beach *v.* White 495
Benedict *v.* Denton..... 336
——— *v.* Thompson..... 446
Benhard *v.* Darrow..... 519
Bergh *v.* Poupard 5
Bird *v.* Hamilton..... 361
Bishop *v.* Williams..... 423
Bragg *v.* Whitcomb..... 307
Britain (Hurlbut *v.*)..... 454
Bronson *v.* Green 56
——— *v.* ——— 486
Brooks *v.* Mead..... 389
Brown (Stevens *v.*)..... 41
——— *v.* Chase..... 43
——— *v.* Byrne..... 453
Burgess (Peck *v.*) 485
Burpee *v.* Smith..... 327
Byrne (Brown *v.*)..... 453

Camp (How *v.*) 427
——— (Eldred *v.*) ..... ”
——— (Kelso *v.*) ..... ”
Campbell adm. etc. (Quackenbush *v.*)..... 525
Carroll *v.* Potter..... 355
——— *v.* Rice..... 373
Cavanaugh *v.* Jakeway..... 344
Chamberlin *v.* Darragh..... 149
Chapin (Rood *v.*)..... 79
Chase (Brown *v.*)..... 43
Chene *v.* Bank of Michigan..... 511
Chipman *v.* Thompson 405
City of Monroe, (La Plaisance Bay Harbor Co. *v.*)..... 155
Clark (Jacox *v.*)..... 249
——— (——— *v.*)..... 508
——— (Fox *v.*)..... 535
Comstock *v.* Howard..... 110
——— (Westbrook *v.*)..... 314
Cooley (Gilbert *v.*)..... 494
Cooper *v.* Ulmann..... 251
Cote *v.* Dequindre..... 64
Crane (Sutherland *v.*)..... 523
Cutter *v.* Griswold..... 437

Darragh (Chamberlin *v.*)..... 149
Darrow (Benhard *v.*)..... 519
Davis (Wixom *v.*) 15
De Armand *v.* Phillips..... 186
Dennis *v.* Hemingway 387
Denton (Benedict *v.*) 336
Dequindre (Suydam *v.*)..... 23
——— (Cote *v.*)..... 64
Disbrow (Godfroy *v.*)..... 260
Dixon (Garlinghouse *v.*)..... 440
Dorr, petitioner, &c..... 145
Dorr (Albany City Bank *v.*)..... 317
Dunning (Wallace *v.*)..... 416

Edwards *v.* Hulbert..... 54
Eldred *v.* Camp..... 427
Emmons *v.* Emmons..... 532

Fellows (Lawrence *v.*) 468
Fitch (Wharton *v.*)..... 143
Forbes (White *v.*)..... 112
Forsyth (Morey *v.*)..... 465
Fox *v.* Clark..... 535
Freeman *v.* Michigan State Bank, 62

609401

Garlinghouse *v.* Dixon 440
Gilbert *v.* Cooley 494
Gilkey *v.* Paige 520
Godfroy *v.* Disbrow 260
Gould *v.* Tryon 339
——— *v.* ——— 353
——— (Bailey *v.*) 478
——— *v.* ——— ..... "
Graham (Thomas *v.*) 117
Green (Bronson *v.*) 56
——— (——— *v.*) 486
——— *v.* Stone 109
Griswold (Cutter *v.*) 437

Hamilton (Bird *v.*) 361
Hammond *v.* Michigan State Bank 214
Harleston (Trowbridge *v.*) 185
Hart *v.* Linsday 72
——— *v.* ——— 144
——— *v.* McKeen 417
Hastings (Michigan State Bank *v.*) 9
Hemingway (Dennis *v.*) 387
——————— *v.* Preston 528
How *v.* Camp 427
Howard (Comstock *v.*) .....
Howard *v.* Palmer 391
Hubbard (Williams *v.*) 28
Hulbert (Edwards *v.*) 54
Hurd (Norris *v.*) 102
Hurlbut *v.* Britain 454

Ingersoll *v.* Kirby 27
——— *v.* ——— 65
Ingerson *v.* Starkweather 346

Jacox *v.* Clark 249
——— *v.* ——— 508
Jakeway (Cavenaugh *v.*) 344
Jerome (Seymour *v.*) 356
——— *v.* ——— 359
Jewett (Ward *v.*) 45
Johnson *v.* Johnson 309
——— *v.* ——— 331
Jones *v.* Smith 115

Kelso *v.* Camp 427
Kimball *v.* Ward 439
Kirby (Ingersoll *v.*) 27
——— (——— *v.*) 65

Lane (Thayer *v.*) 200
La Plaisance Bay Harbor Co. *v.* City of Monroe 155
Lawrence *v.* Fellows 468
Lewis (Woodbury *v.*) 256
Linsday (Hart *v.*) 72
——— (——— *v.*) 144
Lyon (Weed *v.*) 77
Mason *v.* Payne 459
McDowell (Wing *v.*) 175
——— (Simmons *v.*) ..... "
McKeen (Hart *v.*) 417
Mead (Brooks *v.*) 389
Mercer *v.* Williams 85
Michigan State Bank *v.* Hastings 9
Michigan State Bank (Freeman *v.*) 62
——————— (Hammond *v.*) 214
Morey *v.* Forsyth 465
Murphy (Bailey *v.*) 305
——— (——— *v.*) 424

Nelson (Bachelor *v.*) 449
Niles (Bank of Michigan *v.*) 99
——— (——————— *v.*) 398
Norris *v.* Hurd 102
——— *v.* Showerman 206

Oakland County Bank (Attorney General *v.*) 90

Paddock (Payne *v.*) 487
Paige (Gilkey *v.*) 520
Palmer (Howard *v.*) 391
Parker *v.* Parker 457
Payne (Mason *v.*) 459
——— *v.* Paddock 487
Peck *v.* Burgess 485
Phillips (DeArmand *v.*) 186
Potter (Carroll *v.*) 355
Poupard (Bergh *v.*) 5
Prentiss (Thurston *v.*) 529
Preston (Hemingway *v.*) 528

Quackenbush *v.* Campbell, adm., &c. 525

Reeves *v.* Scully 248
——— *v.* ——— 340
Rice (Carroll *v.*) 373
River Raisin and Grand River R. R. Co., (Welles *v.*) 35
Rood *v.* Chapin 79
——— *v.* Winslow 340
Russell *v.* Waite 31

Savage (Wood *v.*) 471
Sawyer *v.* Sawyer 48
——— *v.* Studley 153
Schwarz *v.* Sears 19
——— *v.* ——— 170
——— *v.* Wendell 267
Scully (Reeves *v.*) 248
——— (——— *v.*) 340
Sears (Schwarz *v.*) 19
——— (——— *v.*) 170
Seymour *v.* Jerome 356
——— Jerome *v.*) 359
Showerman (Norris *v.*) 206

Simmons *v.* McDowell..... 173
Smith *v.* Thompson..... 1
———(Jones *v.*)..... 115
———(Burpee *v.*)..... 327
———(Barstow *v.*)..... 394
Snyder (Taylor *v.*)..... 490
Starkweather (Ingerson *v.*)..... 346
Steevens (Albany City Bank *v.*).. 6
Stevens *v.* Brown..... 41
Stewart (Comstock *v.*)..... 110
——— (Whipple *v.*)..... 357
Stockton *v.* Williams..... 120
Stone (Green *v.*)..... 109
Story *v.* Story..... 421
Studley (Sawyer *v.*)..... 153
Sutherland *v.* Crane..... 523
Suydam *v.* Dequindre..... 23
Swift (Thayer *v.*)..... 384

Taylor *v.* Snyder..... 490
Terry (Weed *v.*)..... 501
Thayer *v.* Lane..... 200
——— *v.* Swift..... 384
Thomas *v.* Stone..... 117
Thompson (Smith *v.*)..... 1
———————— (Chipman *v.*) 405
———————— (Benedict *v.*) 446
Thurston *v.* Prentiss..... 529
Trowbridge *v.* Harleston..... 185
Tryon (Gould *v.*)..... 339
——— (——— *v.*)..... 353

Ulmann (Cooper *v.*)..... 251

Waite (Russell *v.*)..... 31
Wallace *v.* Dunning..... 416
Ward *v.* Jewett..... 45
Ward (Kimball *v.*)..... 439
Webb *v.* Williams..... 452
——— *v.* ——— 544
Weed *v.* Lyon..... 77
——— *v.* Terry..... 501
Welles *v.* River Raisin and Grand River R. R. Co..... 35
Wendell (Schwarz *v.*)..... 267
Westbrook *v.* Comstock..... 314
Wharton *v.* Fitch..... 143
Whipple *v.* Stewart..... 357
Whitcomb (Bragg *v.*)..... 307
White *v.* Forbes..... 112
——— (Beach *v.*)..... 495
Williams *v.* Hubbard..... 28
———— (Mercer *v.*)..... 85
———— (Stockton *v.*)..... 120
———— (Bishop *v.*)..... 423
———— (Webb *v.*)..... 452
———— (——— *v.*)..... 544
Wing *v.* McDowell..... 175
Winslow (Rood *v.*)..... 340
Wixom *v.* Davis..... 15
Wood *v.* Savage..... 471
Woodbury *v.* Lewis..... 256

PREFACE

TO ORIGINAL EDITION.

The present volume brings the reports of cases decided in the Court of Chancery, down to the time of publication. The volume lately published containing all the decisions of the late Chancellor, which had been preserved, the two, together, embrace all the principal decisions which have yet been made in this Court.

In preparing this volume for the press, the author has followed, in all instances, the manuscripts of the Chancellor. The work, as it progressed, has all been submitted to his inspection; and such alterations have been made as he suggested. The author begs leave to acknowledge his obligations for the assistance he has given from the commencement of the work to its termination, in examining the copy prepared for the press, and, in many instances, furnishing his own abstracts to be prefixed to the cases. In so doing, he has rendered an important service, both to the reporter and the members of the bar generally, by contributing to render the volume correct in all its essential particulars.

It will be perceived, by referring to the heads of the several pages, that the opinions are delivered in several circuits. Under the system now existing, there are five circuits; each having a register and the usual organization of a separate court. There are, however, no subordinate judges; but the [*viii] Chancellor holds his court in the several *circuits, at regular terms prescribed by law. The service of process is not confined, in the several circuits, to their respective limits. A bill may be filed in any one of them to reach persons or property in any part of the State. There is, in fact, but one court, sitting at different places for the convenience of suitors. The

several judges of the Supreme Court are authorized to allow injunctions in the absence of the Chancellor; and, in cases where he is interested, any one of them may sit in his place. An appeal lies from the decisions of the Court of Chancery to the Supreme Court, which is the Court of last resort.

The omission of the points and arguments of counsel, in many cases, where it may be thought they should have been inserted, requires some explanation. At the time the author received his appointment, a considerable period had elapsed since the argument and decision of nearly all of the cases contained in this volume. Few briefs had been furnished, as the office had been but lately revived; and a desire being generally expressed that the publication should not be delayed, it seemed more advisable to proceed with the materials on hand, than to attempt to collect others from all parts of the State, when the loss of time would only be compensated by, at best, a partial success.

With these explanatory remarks, the work is submitted to the public.

Detroit, April 10th, 1845.

AMENDMENTS TO THE RULES.

JUNE 7TH, 1842.

It is ordered by the Chancellor, that the 81st rule of the Court be amended so as to read as follows:

"RULE 81.

"When the Master has prepared the draft of his report, he shall deliver copies thereof to such of the parties as apply for the same, and shall assign a time and place for the parties to bring in objections, and for settling the draft of the report, *and shall issue his summons for that purpose;* but no summons to see the draft of the report, and take copies thereof, shall be necessary. On the *return of the summons*, or on such other day as may then be assigned by the Master for that purpose, if objections are filed by either party, he may proceed to hear the parties on such objections, and the Master shall settle and sign his report, and cause it to be filed in the proper office, within twenty days after the argument on such objections is closed. If no objections are made to the draft, the Master shall file his report in the proper office within ten days after the time assigned for bringing in objections."*

*JULY 26TH, 1842.

It is ordered by the Chancellor, that the 50th rule [*x] of the Court be amended so as to read as follows:

"RULE 50.

"When a cause is at issue by replication to a plea or answer, either party may, at any time within sixty days thereafter,

---

* Vide *Suydam* v. *Dequindre*, *post* 23.

enter an order of course, and give notice thereof to the opposite party, for the taking of testimony within sixty days from the service of notice of such order; and either party, under such order, may, at any time within the said sixty days, take the testimony of his witnesses, upon giving ten days' notice to the opposite party of the names and places of abode of the witnesses to be examined, and of the time and place of such examination, and the person before whom the same will be taken. At the end of the said sixty days, either party, on filing an affidavit of the service or of the receipt of such notice, may enter an order that the proofs in the cause be closed.

"If neither party shall enter an order for the taking of testimony and serve notice thereof on the opposite party, within thirty days after the cause is at issue as aforesaid, the cause shall stand for hearing on bill, answer, and replication, and may be noticed by either party."

And it is further ordered that the 58th rule of this Court be, and the same is hereby abolished.

March 31st, 1844.

The following additional rules were adopted:

Rule 119.

Any application for the appointment of a special guardian to sell the real estate of an infant, must be by petition of the general guardian of such infant, if he has any; and if [*xi] he has no guardian, then by the petition of the *infant himself, if of the age of fourteen years or upwards, or of some relative or friend if he is under that age. The petition must be verified under the fourteenth rule of the Court, must state the age and residence of the infant, the situation, value, and annual income of each piece or parcel of real estate proposed to be sold, and the circumstances that render a sale necessary or proper. It must also state the name and residence of the proposed guardian, the relationship, if any, which he bears to the infant, and the security he proposes to give; and the proposed guardian must give his assent in writing at the foot of the petition.

Rule 120.

On presenting the petition to the Court, an order may be entered referring it to a Master, to be designated in the order by name, to ascertain the truth of the facts stated in the petition. The Master shall take proof of the age of the infant, the value of the infant's interest in each piece of real estate proposed to be sold, and of the circumstances that render a sale necessary or proper, and of the sufficiency, under the 121st rule, of the sureties offered by the guardian, or of the land proposed to be mortgaged by way of security, which proof shall be attached to his report; and he shall in his report certify whether the proposed guardian is a suitable person for this purpose, the age of the infant, the sufficiency of the sureties, the penalty of the bond required to be given by the guardian under the said 121st rule, the value of each piece of real estate proposed to be sold, and his opinion as to the necessity or propriety of a sale of the whole or any part thereof, for the benefit of the infant; and that such sale will not be against the provisions of any will or conveyance, if any, by which such real estate was devised or granted to such infant; and if he is not satisfied with the person named as guardian, or with the security proposed, *he may name a suitable person as guardian, and [*xii] state what other or further security should be given.

Rule 121.

The guardian must give a bond, with two sufficient sureties, in a penalty of double the value of the real estate to be sold, including interest, on such value during the minority of the infant, each of which sureties must be worth the penalty of the bond, over and above all debts; or a bond of the guardian only, secured by a mortgage on unincumbered real estate, of the value of the penalty of such bond.

Rule 122.

To every commission for the examination of witnesses out of the State, a copy of this rule shall be annexed, as instructions to the commissioners on the execution of the commission.

1st. Any one of the commissioners may execute the commission.

2d. The witness, before he is examined, must take an oath or affirmation, to be administered by the commissioner, that the answers to be given by him to the interrogatories annexed to the commission, shall be the truth, the whole truth, and nothing but the truth.

3d. The examination of the witness must be reduced to writing by the commissioner, or by some one in his presence, and under his directions; and must be signed by the witness, and certified by the commissioner, as follows:

"Examination taken, reduced to writing, and sworn to (or affirmed) this day of , before me, A. B., Commissioner."

4th. Exhibits must be annexed to the deposition of the witness, and be signed by him and the commissioner.

5th. The commissioner must subscribe each sheet of
[*xiii] *the deposition, annex the deposition and exhibits to the commission, and indorse his return on the back of the commission.

"The execution of this commission appears in certain schedules hereunto annexed." A. B. Commissioner."

6th. The commissioner must enclose the commission, interrogatories, deposition, and exhibits, in a packet, and bind it with tape, and set his seal at the several meetings or crossings of the tape, and direct it—"To Register of the Court of Chancery of the State of Michigan, at ———."

7th. He must then deposit the commission in the Post Office, unless there are written directions on the commission to return the same in another way.

Rule 123.

The Register, on the commission being returned, shall open it, and indorse thereon the time and manner of receiving it.

Rule 124.

No deposition will be suppressed on the hearing of a cause, for irregularity or informality in the taking of such deposition, but the question must be brought before the Court on a special motion for that purpose, before the cause is brought to a hearing.

MARCH 24TH, 1845.

Ordered, that the 56th rule of this Court be amended, so as to read as follows:

RULE 56.

"Documents, which are of themselves evidence without further proof, shall not be read on the hearing, unless they have been made exhibits before the Master or commissioner; and no deed or other writing shall be proved at the hearing, except on an order previously obtained, after due notice to the adverse party."*

*Vide *Bacheldor* v. *Nelson*, *post* 449.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF CHANCERY

FOR THE

STATE OF MICHIGAN.

RANDOLPH MANNING, CHANCELLOR.

Smith & Willard *v.* Thompson.

A judgment creditor, who files a bill to have his judgment satisfied out of choses in action belonging to his debtor, must show, 1st, A judgment; 2d, An execution sued out on such judgment; and 3d, A return of the execution unsatisfied in whole or in part: and unless these facts appear affirmatively in the bill, this court has no jurisdiction of the case.[1]

An execution cannot be legally returned until the return day thereof; and where an execution was returned May 17th, when it was returnable on the 18th, the return was held to be insufficient to authorize the filing of a creditor's bill.[2]

An execution may be levied at any time on the return day, and the execution of the writ be completed by a sale of the property after that day.

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[1] See Williams *v.* Hubbard, *post*, 28; Freeman *v.* Mich. State Bank, *post* 62; Maynard *v.* Hoskins, 9 Mich., 485; Tyler *v.* Peatt, 30 id., 63.

For exceptions to the rule, see Beach *v.* Bestor, 45 Ill, 341, S. C. 47 id., 521; Steere *v.* Hoagland, 39 id., 264; McDaniel *v.* Cochrane, 11 id., 31; Bay *v.* Cook, 31 id., 336; Newman *v.* Willett, 52, id., 98.

[2] See Beach *v.* White, *post*, 495; Freeman *v.* Mich. State Bank, *post*, 62.

Smith *v.* Thompson.

This was a motion to dissolve an injunction, on a judgment creditor's bill, on the ground that the execution which was returnable May 18th, 1841, had been returned by the sheriff on the seventeenth day of that month.

Kingsly & Backus, in support of the motion.

G. E. Hand, contra.

The Chancellor. It was decided by this Court, first in the case of *Thayer* v. *Swift*, Harr. Ch., 430, and afterwards in *Stafford* v. *Hulbert*, Harr. Ch., 435, that a judgment [*2] creditor's bill, could not be *sustained where the execution was returned unsatisfied before the return day named in the writ; although the bill was not filed until after the return day.

On the argument of the present motion, however, it was insisted that these cases were erroneously decided by my predecessor, and should therefore be overruled; and the Court was referred to a newspaper report of a case recently decided in the Court of Chancery of the State of New York, from which it would seem a different decision has been made by the Chancellor of that State. The grounds upon which this decision was based do not appear in the report of the case; and, after having given considerable attention to the subject, I can see no good reason for doubting the correctness of the decision of this Court, in the cases above referred to.

A judgment creditor who files a bill in this Court, to have his judgment satisfied out of choses in action belonging to the debtor, must show, 1st, A judgment; 2d, An execution sued out on such judgment; and 3d, A return of the execution un-

See, however, First Nat. Bank *v.* Gage, 79 Ill., 207; Lewis *v.* Lanphere, id., 187.

A return on the return day will, however, be sufficient. Williams *v.* Hubbard, 1 Mich., 446.

So, where to an execution against two defendants, the sheriff returned that they had no goods or chattels, etc., without in terms negativing the fact that neither of the defendants had, it was held that the return was sufficient. Williams *v.* Hubbard, *supra.*

satisfied in whole or in part. Unless these facts appear affirmatively in the bill, the Court has no jurisdiction of the case. The complainant must show he has in good faith exhausted his remedy at law, without producing a satisfaction of his debt. All the Legislature intended by the statute giving jurisdiction to this Court in this class of cases, was to give the creditor a remedy in this Court, after he had exhausted his remedy at law, where the debtor had choses in action, or other property, which an execution could not reach, and which ought, in justice and equity, to be applied by him in payment of the judgment.

Is the return of the officer to the execution in the present case a good return, or such a return as shows the complainants have exhausted their legal remedy? If it is not, *the complainants cannot sustain their bill, and the injunction must be dissolved. An execution may be levied [*3] at any time on the return day, and the execution of the writ be completed by a sale of the property after that day. *Devoe* v. *Elliott*, 2 C. R. 243, 2 Burr, 812; 1 T. R. 192, R. S. 452, § 14.

Now the sheriff's return does not show the defendant had not property on which he might have levied, on or before the return day of the execution. This should appear from the officer's return in order to give this Court jurisdiction; and unless it does so appear, the return itself is insufficient. In *Cavenaugh* v. *Collett*, 4. Barn. & Ald. 279, (S. C. 6 Eng. Com. Law Rep. 425,) where the return of the officer stated the defendant was insane, and could not be removed without danger to his life, when the officer went to arrest him; without adding that he continued so to the return of the writ; it was held to be bad on that account. In *Palmer* v. *Patten*, Cro. Eliz. 512, it was held that the sheriff should not accept a return of *nulla bona* from a bailiff before the return day of the writ, as the defendant might after such return, and before the writ was returnable, have property to satisfy it. The return of the execution then on the 17th May, instead of the 18th, when it was returnable, was an insufficient return; and an insufficient return is as no return, or not such a return as

will protect the officer against an attachment for not making a correct return. *Watson's Sheriff* 76; *Rex* v. *Sheriff of Middlesex*, 1 Barn. & Ald. 190. If the sheriff had returned the execution unsatisfied, for the want of goods and chattels, without making any mention of lands and tenements, such a return would not have been sufficient to give this Court jurisdiction; nor can a return be so which is in any other respect defective, in not showing a want of goods and chattels, lands and [*4] tenements, belonging to the *debtor, within the bailiwick of the sheriff, out of which the money might have been made by him, within the time allowed for that purpose by the execution. One day in the return of the execution, it was said on the argument, would make no difference. If one day cannot, how many shall? Must it be two, or twenty, or some other number? But this is not the question. The question is, whether the Court can disregard the law, which requires an execution to be taken out and returned unsatisfied in whole or in part, before the judgment creditor shall have relief in this Court. If the Court can dispense with a good and sufficient return to the execution, might it not dispense with the execution entirely, and assume a jurisdiction not given by law? The cases supposed are the same in principle, and differ in degree only. In *Cassidy* v. *Meacham*, 3 Paige 311, and *Steward* v. *Stevens*, 1 Har. Ch. Rep. 169, it was decided a creditor's bill could not be filed until after the return of the execution. In these cases, the execution was returned, and the complainant's bill filed before the return day. It was stated by the Court, in both cases, that an execution could not be considered as legally returned unsatisfied, until the return day, and, for that reason it was held the creditor could not file his bill until after that day. If the execution could not be considered as legally returned before the return day, it follows that a return made before that time would not be a good return, and so it must have been considered by the Court, in both of these cases. I can see no other principle on which these cases can be sustained; for, if the return of the execution unsatisfied, before the return day, is a good return, the creditor had a right under the stat-

ute, at any time thereafter, to file his bill without waiting till the return day of the execution. The statute does not require him, after his *execution has been returned unsatisfied, to wait any length of time whatever before he files his bill. [*5]

The statute (R. S. 451 § 8) which says: "The officer to whom any execution shall be directed, shall return such writ to the Court to which the same is returnable, (on) or before the first day of the term to which such writ is made returnable," makes it the duty of the officer, when the writ has been executed, to return it forthwith without waiting the return day; but in no other case. The officer has no right to retain the money after it has been collected.

The injunction in this case must be dissolved.

Bergh & Arcularius *v.* Poupard & Beaubien.

Where a judgment creditor's bill is verified under the 110th rule, by the complainant's agent, who is not also solicitor of the complainant, the jurat should state the person verifying to be the agent of the complainant; but where it is verified by the oath of the complainant's solicitor, the Court will take notice of that fact from the records and proceedings in the cause.

This was a motion for the appointment of a Receiver on a judgment creditor's bill. The motion was opposed, on the ground that the jurat did not state the person verifying the bill, to be the agent, or attorney of the complainants.

Douglass & Walker, for the complainants.

Van Dyke & Harrington, for the defendants

The Chancellor. The 110th rule of the Court requires bills of this description to be verified by the oath of the *complainant, or in case of his absence from the State, or other sufficient cause shown, by the oath of his agent or [*6]

attorney. Where the bill is verified by the complainant's agent, who is not also the solicitor of the complainant, the jurat should state the person verifying to be the agent of the complainant; but where, as in the present case, it is verified by the oath of the complainant's solicitor, the Court will take notice of that fact from the record and proceedings in the cause.

The motion must be granted.

Albany City Bank *v.* Frederick H. Steevens *et al.*

The petition under the 117th section, (R. S. 376,) should set forth briefly all the facts necessary to enable the mortgagor, as well as the Court, to understand its object.

A copy of the petition, with a notice of the time of presentation to the Court, must be served on the mortgagor, in order to afford him an opportunity to show cause why the prayer of the petition should not be granted.

Where the service cannot be made on the mortgagor, by reason of his absence from the State, it may be made on his solicitor.

A copy of the petition need not be served on defendants made parties as subsequent incumbrancers.[1]

This was a motion to confirm a Master's report of sale for an installment of interest due on a mortgage, and also for a further order to sell, for the principal, which had since become due. It appeared that a decree had been entered December 7th, 1840, for the sum of $3821.99, being the amount of interest then due on the mortgage; that January 16th, 1842, the principal
[*7] fell due; that April 6th, 1842, an *order was entered with the register, referring it to a Master to ascertain and compute the amount of principal and interest due on the mortgage; that on the 8th day of April a part of the mortgaged premises were sold to satisfy the decree for interest. That on

[1] As to the nature of the proceeding for a further decree for an additional installment, see Brown *v.* Thompson, 29 Mich., 72.

the coming in of the Master's report of sale and also of the amount due on such reference, the complainants moved for a confirmation of the report, and at the same time presented their petition, a copy of which had been served on the solicitors of the mortgagor, stating that the whole amount of the principal sum secured by the bond and mortgage had become due, and that there was then due, as appeared by the report of the Master, the sum of $26,670.50 as principal and interest since the decree, and asked for a future or supplemental order to sell so much of the mortgaged premises remaining unsold, as should be necessary to pay the amount then due.

Barstow & Lockwood, in support of the motion.

A. D. Fraser, contra

The Chancellor. The Revised Statutes (page 378, § 117) provide, where there is a default subsequent to the decree in the payment of any portion or installment of the principal, or of the interest due upon the mortgage, the Court may, on the petition of the complainant, by a further order founded upon the first decree, direct a sale of so much of the mortgaged premises to be made, under the decree, as will be sufficient to satisfy the amount so due, with the costs of such petition and the subsequent proceedings thereon; and that the same proceedings may be had as often as a default should happen. The petition under this statute should set forth briefly all the facts necessary to enable the mortgagor, as well as the Court, to *understand its object. It should state when the bill [*8] was filed the date of the decree, and the amount that had become due upon the mortgage since that time; and that the whole or some part thereof remained unpaid.

A copy of the petition, with a notice of the time it will be presented to the Court, should be served on the mortgagor, in order to afford him an opportunity to show cause why the prayer of the petition should not be granted; and if no cause is shown, the petitioner will be entitled to an order of reference to a Master to compute the amount due, and on the coming in of

the Master's report, to such further order as the case may require. Where service cannot be made on the mortgagor, by reason of his absence from the State, it may be made on his solicitor. A copy of the petition need not be served on subsequent incumbrancers who are made parties to the suit. Decrees in this class of cases are analogous to judgments at law for the penalty of a bond, where the plaintiff is required to proceed by *scire facias* to have damages assessed on a breach occurring after the rendition of the judgment. The reference to the Master in this case to compute the amount which had become due since the decree, was irregular, as it was made without a special order of the Court for that purpose, and the petition should have been served on the mortgagor instead of the solicitor.

So much of the Master's report as relates to the reference made on the 6th instant, cannot be confirmed, and the prayer of the petitioners must be denied. But that part of the report which relates to the sale of a part of the mortgaged premises, may be confirmed.

[*9] *The President, Directors and Company of the Michigan State Bank *v.* Eurotas P. Hastings.[1]

On a motion for an injunction, the statements in the bill must be taken as true; and the relief sought must be consistent with the case made by the bill.

The possession of State property by the authorized agents and officers of the State, is the possession of the State.

A State may sue, but it cannot be sued in its own courts; and, where the nominal defendant was the late Auditor-General of the State, and the complainants' bill sought to reach property conveyed to, and held by him, in his official capacity, *it was held*, that the State was the real party defendant, and that the Court had no jurisdiction of the case.[2]

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[1] S. C., 1 Doug., 225. See, also, id., 527.

[2] The rule that a State cannot be sued in its own courts is applicable only

Michigan State Bank *v.* Hastings.

THIS was an application for an injunction. The bill stated that, in 1839, and previous thereto, the complainants were indebted to the State of Michigan, in the sum of $500,000, or thereabouts; and that, in February of that year, the bank became embarrassed, and stopped payment. That in February, 1840, the legislature passed an act authorizing the Auditor General, State Treasurer, and Secretary of State, to settle with the bank, and appointing them commissioners for that purpose. That the bank refused to settle until the forfeiture of their charter should be remitted; and that, on the twenty-eighth day of March, 1841, an act was passed by the legislature, declaring that if the bank should settle with the commissioners under the law before mentioned, and should resume specie payments on or before the first day of April, 1841, then nothing done or suffered by the bank previous to that act, should in any way affect their chartered privileges. That, on the first day of May, 1841, the bank settled with the commissioners, agreeably to the provisions of the act of February of that year, and assigned, transferred, delivered, *and set [*10] over to them, in payment of the debt due to the State, bills, notes, accounts, lands, and other property, amounting to $633,567.98. That an instrument by which the assignment was made, and which set forth the terms or conditions of the settlement, was executed by the commissioners on the part of the State, and by the president of the bank on behalf of the corporation, whereby the commissioners acquitted and discharged the complainants from all claims, dues and demands, which the State had against the bank; and the assignment of the property and effects contained in the schedule annexed to said instrument, was stated to be made upon the express condition, that the State should indemnify and save harmless the complainants and their grantors, immediate and remote, from and against the several liabilities stated in said agreement. That,

where the State is made a party defendant, and does not apply where the object of the suit is to reach property held by State officers, in which the State has ceased to have any legal interest. S. C., 1 Doug., 225; Michigan State Bank *v.* Hammond, id., 527.

among those liabilities was a certain bond and mortgage on their banking-house and lot, executed by the complainants to the Bank of Michigan, (which banking-house and lot were, at the same time, conveyed to the Auditor General, subject to said mortgage,) on which there was then remaining unpaid the principal sum of $11,250.

The bill then charged, that the State had realized a large amount of money from the property so transferred; that this money had gone into the State treasury; that the State had not, by any legislative action, repudiated the settlement, and that it had taken no measures to indemnify and save harmless the complainants from said bond and mortgage, and other liabilities mentioned in the indenture. That, on the seventeenth day of February, 1842, the legislature passed an act constituting the Auditor General, State Treasurer and Secretary of State, trustees, on behalf of the State to take charge of the assets and property assigned to the State, and sanctioning the agree-
[*11] ment entered *into between the bank and the commissioners, except so much thereof as purported to bind the State to indemnify the complainants, or to pay or advance money to discharge incumbrances, or for any other purpose; and these parts of said agreement were expressly rejected. That the act also authorized the trustees to sell or lease said property, and to collect, compromise or extend the time of payment of the debts assigned, in the best manner possible for the interest of the State; and to pay all moneys collected into the State treasury, for the redemption of State scrip. That the State had not paid the bond and mortgage given to the Bank of Michigan, but had permitted the same to be foreclosed, and the mortgaged property to be sold at a great sacrifice for much below its real value; and that it had refused to pay off and satisfy the balance still due on said bond, amounting to $7,000, for which the complainants had been threatened with a suit.

The bill charged, also, that the State was insolvent and unable to pay its debts; that much of the property had been permitted to become worthless through inattention; that the settlement could not be set aside or repudiated by complain-

ants, because it was beyond the power of the State to place the complainants in the situation they were in when the settlement was made; and that a large amount of the property so assigned by the complainants, still remained in the hands of the defendant, who was one of the commissioners.

The bill prayed for an injunction against the defendant, to inhibit the delivery of the property in his possession to the trustees of the State; and that the defendant might be declared a trustee for the complainants; and that he might be directed to sell and dispose of the property, and pay off the said bond and mortgage, and other liabilities of the complainants.

**Joy & Porter*, in support of the motion. [*12]

Pratt, Morey and Attorney-General, contra.

The Chancellor. The complainants' bill, for the purpose of the present motion, must be taken to be true; and the relief to which they are entitled, if any, must be consistent with the case made by the bill. *Wilkins* v. *Wilkins*, 1 J. C. R., 111. The complainants claim relief on the ground that the settlement made between the bank and State, on the first of May, 1840, is binding on the State; and that the State has not complied with the conditions on which the settlement was made, by paying off the bond and mortgage on the banking house and lot, and the other liabilities of the complainants against which it was to indemnify them by the terms of the settlement. And they allege that the mortgage had been foreclosed, and the property sold at a great sacrifice; and that there is still a balance unpaid of $7,000, for which they have been threatened with a prosecution; that the State has received large sums of money, from the property assigned to it by the complainants, and that such money has gone into the treasury of the State, and been used for other purposes than to pay off the liabilities of the complainants; and that the State is insolvent, and unable to pay its debts.

This is the substance of the complainants' bill; and they ask

an injunction against the defendant, to prevent him from delivering over the property to the trustees appointed by the State to take charge of the same; and that he may be declared a trustee for the benefit of the complainants, and be directed to sell and dispose of the property, and to pay off the liabilities against which the State agreed to indemnify them.

On this statement of facts, two questions present
[*13] *themselves: *First*, whether the present suit, although instituted against Mr. Hastings, is not in fact a suit against the State to compel the performance of a contract by the State; and if it is, then *Second*, whether the Court has jurisdiction of the case.

The complainants' bill is based on the validity of the settlement. By the settlement, the property now in the possession of Mr. Hastings was assigned and delivered by the complainants to the State; for the delivery of it to the commissioners, or to Mr. Hastings, (who was one of them) was a delivery of it to the State itself. The complainants' interest in the property, when it was assigned and delivered by them to the commissioners, vested in the State; and must still be in the State, unless it has parted with that interest; which is not the case in the present instance. This suit, then, is nominally a suit against Mr. Hastings, but in reality a suit against the State; as its object is to have State property applied in payment of what is alleged to be a State debt, or a debt the State is bound to pay. Has this court, then, jurisdiction of the case? A State may sue, but it cannot be sued in its own courts, unless there is some statute giving the Court jurisdiction in express terms; and then it must be strictly pursued. If the State could be sued like an individual, and judgment obtained, and an execution taken out, and its property levied on, and sold, great evils would be likely to result to the public from such a course; and serious obstacles might be interposed to the administration of the government itself. It will, therefore, hardly be contended that this Court has jurisdiction of a case like the present, where the complainants ask the interposition of the Court on a statement of facts, which shows that the State, and not the defendant, is the party

in interest. The case of *Osborn* v. *Bank of United States*, 9 Wheat. R. 738, which the counsel for *com- [*14] plainants cited, on the argument as decisive upon the question of jurisdiction, is not applicable. The Bank of the United States, in that case, did not file their bill against Osborn and others to compel the performance of a contract between the bank and the State; but to inhibit the execution of an unconstitutional act of the legislature, by the officers of the State; and to obtain the restitution of property which had been taken by those officers, without authority of law, under that act.

The motion must be denied; and the provisional injunction heretofore granted, until the motion could be heard and decided, is dissolved

Motion denied.

NOTE. The bill was afterwards amended, by making the Auditor-General, State Treasurer, and Secretary of State, parties, who put in a demurrer, on which the bill was dismissed; and an appeal was taken to the Supreme Court, where the decree dismissing the bill was affirmed, but on a different ground from that taken by the Chancellor; the Supreme Court holding the Chancellor had jurisdiction of the case, and consequently that it was competent for him to have given relief against the State, if complainants had made out a proper case by their bill; that is, had shown themselves damnified by being compelled to pay off the bond and mortgage which the commissioners had agreed the State should pay. And Osborn *v.* The Bank of the United States, 9 Wheat. R. 733, noticed by the Chancellor in the concluding part of his opinion, was relied on by the Supreme Court, to show the jurisdiction of the Chancellor. They appear, however, to have overlooked the broad distinction between the two cases, viz: that one was a case of *tort*, and the other of *contract*. They admitted the State could not be sued, and yet held the Court had jurisdiction to enforce a contract against the State, in a suit to which the State was not so much as a party. In Osborn *v.* The Bank of the United States, the bank sought relief on the ground that the act of the legislature, under which the officers of the State had acted, was unconstitutional and void; and on that ground, and no other obtained relief. The acts of a State officer, when unauthorized by the constitution and laws of the State, though done in the name of the State, are his individual acts, for which he alone, in his individual capacity, and not the State, is responsible. Such acts are the individual acts of the person; and not of the officer in his official capacity, or of the State. While, in the case before them, relief was asked on the ground of a contract withthe State, which contract it was insisted was good and binding on

the State, and should therefore be performed by the State. The two cases were as dissimilar as any two cases well could be. The Court say in the case. in Wheaton: "The State not being a party on the record, and the Court having jurisdiction over those who are parties on the record, the true question is, not one of jurisdiction, but whether, in the exercise of its jurisdiction, [*15] the Court ought to make against the *defendants*, *whether they *are to be considered as having a real interest, or as being only nominal parties.*" * * * * "This question has already been considered. The responsibility of the officers of the State for the money taken out of the bank, was admitted, and it was acknowledged that this responsibility might be enforced by the proper action." In that case, the defendants were real, not nominal parties. They were liable and might have been sued at law for the trespass. But Mr. Hastings, against whom the bill was first filed, had no interest in the contract between the State of Michigan and the bank. The bank could not have sustained an action on the contract against him at law. He was not at the time so much as an officer of the State; and the bill, with as much propriety, might have been filed against any other person who happened at the the time to be in possession of any part of the property. The difficulty was not cured by making the State officers parties. C.

See the statements in this note corrected in Michigan State Bank *v.* Hammond, 1 Doug., 527.

Isaac Wixom *v.* Delos Davis *et al.*

The ignorance of a party of his defense at law is not a sufficient reason to warrant the Court in interfering with a judgment, where such ignorance is connected with negligence, and might have been removed by the use of ordinary means to obtain the necessary information.

This was a motion to dissolve an injunction.

The complainant's bill stated, that one Cook of the town of Farmington, Oakland county, in which town the complainant resides, in February 1838, applied to the defendant Davis, of the city of Detroit, for a loan of money, and received $700, in the bills of the Farmers' Bank of Genesee, and the Bank of Sandstone, institutions, nominally and professedly, banks under the general banking law of the State, but which were, in reality, instituted for purposes of fraud, and to give circulation to bills

of no value; and that Davis knew these facts, and had procured these bills for the purpose of defrauding such persons as might come into the possession of them. That Davis was, in some way, connected with the Farmers' Bank of Genesee, *or with those who were its originators, and had got [*16] from it a large quantity of its bills, for which he had given little or no security; and that he knew when he paid them to Cook, that they were worthless, and that he was acting fraudulently in giving circulation to them. To secure the payment of the $700, Cook gave his promissory note to Davis, payable in three months, and indorsed by complainant and two others. About three weeks afterwards the Bank of Genesee failed, and its bills became worthless, and strong imputations of fraud were made against all concerned with it; and, in the charges growing out of its failure, Davis was implicated, and, immediately thereafter, left the State. Cook went to Detroit, and found the $700 note in possession of Davis's agent, and, being assured the bank would ultimately pay its liabilities, he paid $550 on it, and agreed to give a note for $150; which he afterwards did, on the first of March of the same year. This last note was indorsed by the complainant, who was ignorant, at the time, of the circumstances under which it was given. The bank proved to be utterly insolvent; and Cook did not receive for its bills over twelve per cent.

The complainant's bill then charged, that the note for $150 was given without any consideration, and that the whole transaction was a fraud on Cook and the complainant. That, on the fourth day of December, 1839, Davis sued the complainant on the note, and, on the thirteenth day of May following, obtained a judgment against him, by default, for $172.06 damages, and $29.20 costs. The bill further stated, that complainant, until the month of November, 1841, when he filed his bill, was entirely ignorant of the facts above stated; and that, if he had been aware, or had suspected, during the pendency of the suit against him, that the facts were as he had since learned *them to be, or that there was any defense to said note, [*17] on the ground of want of consideration, or fraud, he

would have defended the action; and that, during the pendency of the suit, he waived any defense he might have had on account of the note not having been protested for non-payment, and allowed judgment to pass against him, only because he was ignorant of the facts stated. That an execution had been taken out and levied on his goods, which were advertised for sale; and that Cook was reputed to be insolvent.

The bill prayed for an injunction, to restrain the defendants from selling the goods, &c., which was granted; and the defendants now move to dissolve the injunction.

T. Romeyn, for complainant.

H. H. Emmons, for defendant.

The Chancellor. From the complainant's bill, it appears that he and Cook, the maker of the note on which the judgment was obtained, reside in the same town; and it is nowhere stated that the complainant, when he was sued, applied to Cook to know whether there was a defense to the action. The inference is that he did not; for, if he had, as Cook knew all the facts, it is to be presumed he would, in season to have made his defense at law, have been put in possession of the information of which he complains he was ignorant when the judgment was obtained. He had indorsed the note for the accommodation of Cook; and he should have inquired of him when he was sued upon it, if there was any defense. In this respect he failed to use that diligence he should have used, and the injustice of which he complains is the result of his own negligence, and not of any defect in the law. This Court cannot give
[*18] relief in such a case. "I do not know (*says Chancellor Kent, in *Penny* v. *Martin*, 4 J. C. R., 566,) of any principle that will authorize this Court to take jurisdiction of a case where the remedy was, in the first instance, full and adequate at law, because the party may have lost that remedy by ignorance, founded on negligence, not on accident, or mistake, or

on any misrepresentation or fraud."[1] The complainant not only neglected to inquire of his principal whether there was a defense to the action, but waived, as the bill states, "any defense he might have had on account of the note not having been protested for non-payment;" and then, eighteen months afterwards, and after an execution had been taken out and levied on his property, and the same had been advertised for sale, files his bill for relief, without stating any excuse whatever, for not having made his defense at law, otherwise than his ignorance of the facts until a short time previous to filing the bill of complaint.

The ignorance of a party of his defense at law is not a sufficient reason to warrant the Court in interfering with a judgment, where such ignorance is connected with negligence, and might have been removed by the use of ordinary means to obtain the necessary information. *Penny* v. *Martin*, 4 J. C. R., 566; *Foster* v. *Wood*, 6 J. C. R., 87; *Duncan* v. *Lyon*, 3 J. C. R., 351; *Aurial* v. *Smith*, 1 Turn. & Russ., 121; (S. C. 11 Eng. Cond. Ch. R. 69.) This is the rule in equity where a party asks for leave to file a bill of review; *Livingston* v. *Hubbs*, 3 J. C. R., 124; *Bingham* v. *Dawson*, Jac. R., 243; (S. C. 4 Eng. Cond. Ch. R., 114;) and at law, where he applies for a new trial on the ground of newly discovered evidence. *The People* v. *Superior Court of New York*, 5 Wend. R., 121. The injunction must be dissolved.

Injunction dissolved.

[1] See also Barrows *v.* Doty, 1 Harr. Ch. R., 2; Wright *v.* King, id., 12, and note at the end of the case.

[*19] *Catharine Schwarz *et al. v.* Nathan Sears *et al.*

Where, on a reference to a Master to ascertain the amount due on a mortgage, the mortgagor appeared before the Master, and at first refused to take a part in the proceedings, but after remaining in the Master's office for an hour or more, and before the opposite party had left, offered to prove certain payments on the mortgage, and the Master refused to hear the testimony, on the ground that his report was closed, or that it was then too late, the Court decided that the Master should have heard the testimony offered.

Where a Master has erroneously refused to receive testimony, a motion should be made for an order requiring him to receive it; and this should be done immediately, and without waiting for him to make his report.[1]

The Master should in such case, at the request of either party, make out and deliver to the party requiring it, a certificate stating briefly the facts of the case, and his reasons for rejecting the testimony; that the Court may review his decision with as little delay as possible.

Exceptions to a Master's report, are proper only where the Master has come to an erroneous conclusion, either of law or fact, on the whole or some part of the evidence before him, touching the subject matter of the reference.[2]

The admissions in a bill or answer, to be conclusive on the party making them, must be full and unequivocal. They must not be inferred from other admissions, unless the express admission is so closely connected with the one to be inferred, that to disprove the latter would disprove the former.

This was a motion to set aside a Master's report, for irregularity.

The complainants had filed their bill to have a statutory foreclosure of a mortgage declared null and void, and to redeem the mortgaged premises. The bill was taken as confessed against the defendants, who afterwards obtained an order of reference to a Master to compute and ascertain the amount due on the mortgage. The Master assigned a day to hear the parties, and, at the time appointed, Schwarz and his solicitor

[1] See Wood *v.* Jewett, *post*, 45; Emerson *v.* Atwater, 12 Mich., 314.

[2] See Emerson *v.* Atwater, *supra*.

appeared. At first *they objected to taking any part [*20]
in the proceedings before the Master, alleging that they were dissatisfied with the reference; but after remaining in his office about an hour, and conversing on the several payments that had been made on the mortgage, Schwarz, by his solicitor, proposed to prove before the Master that more payments had been made on the mortgage, by the complainants, than the several payments stated by them in their bill of complaint. The Master refused to receive the testimony; and stated, as a reason for doing so, that his report was closed, or that it was then too late.

A. D. Fraser, for complainants.

Witherell & Buel, for defendants.

The Chancellor. The Master erred, in refusing to receive the evidence offered by the complainants. Schwarz and his solicitor were dissatisfied with the reference, and did not intend, when they went to the Master's office, to take any part in the proceedings; but they came to a different conclusion before leaving it, and while the defendants' counsel was still present. I think the Master should, therefore, have heard the testimony. It was clearly competent for him to have done so. It was the first appearance of the parties before him, and the proceedings had not advanced so far as to render it improper.

But it is insisted, by the counsel for the defendants, that the complainants cannot take advantage of the Master's error on this motion; first, because they have not excepted to the report, and secondly, because they have, by setting out various payments in their bill, precluded themselves from showing other payments; or, in other words, admitted the balance, after deducting these payments, to be the amount due on the mortgage.

*When the Master has erroneously refused to receive [*21]
testimony, as was the case in the present instance, a motion should be made for an order requiring him to receive it. This should be done immediately, and without waiting for

him to make his report; and the Master, at the request of either party, should make and deliver to such party a certificate stating briefly the facts of the case, with his reasons for rejecting the testimony, that the Court may review his decision with as little delay as possible. See *Hoff. Mast. in Chan.* 58–59, and cases there cited. Exceptions to the report are proper only where the Master has come to an erroneous conclusion, either of law or fact, on the whole or some part of the evidence before him touching the subject matter of the reference. *Tyler* v. *Simmons*, 6 Paige R. 127. When a witness is improperly rejected, the evidence he might have given is not taken into account by the Master in making up his report, nor is it by the Court, in reviewing on exceptions the correctness of the conclusions the Master has come to from the evidence before him. The Court will not hear evidence that was not before the Master, nor undertake to decide a different case, or what the Master's report should have been on a different state of facts.

With regard to the second objection, it would be a sufficient reason for refusing to send the report back to the Master to be reviewed by him, if the complainants had stated in their bill a certain sum to be due on the mortgage; or if, after setting forth the various payments, they had gone on to state they were the *only* payments, or *all* of the payments that had been made on the mortgage. There would then have been a clear and full admission of the amount due, or of all the facts necessary to ascertain it.

The admission of a party, in a bill or answer, to be [*22] *conclusive on the party, must be full and unequivocal. They must not be inferred from other admissions, unless the express admission is so closely connected with the one to be inferred, that to disprove the latter would disprove the former. It has already been stated there is no direct admission in the complainants' bill of the amount due on the mortgage. It is, however, to be inferred, from the various payments stated in the bill of complaint, that the amount due is the balance which will remain, after deducting these payments from the amount for which the mortgage was given. But this may, or may not

be true; and to disprove it would not contradict any allegation of the bill. The complainants therefore should not be precluded from showing other payments, in addition to those stated, if they can establish such payments by clear and unquestionable proof. At the same time, the Court will not disregard the strong presumption arising against such payments from the complainants' own statement of their case; and must be satisfied beyond a reasonable doubt that they have been made, before allowing them.

The proceedings before the Master were regular, and the motion to set aside the report for irregularity must be denied; but as the Master erred in refusing to hear the complainants' testimony, an order may be entered for him to review his report.

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*Richard Suydam *et al. v.* Antoine Dequindre [*23] *et al.*

Practice as to confirmation of Master's report under the eighty-second rule of the Court.

An agreement between counsel in a case must be in writing, or reduced to the form of an order by consent, pursuant to the provisions of rule 87, in order to be noticed by the Court.[1]

Where the proceedings before a Master have been irregular, his report may be set aside for irregularity, on motion. In such case an order should be obtained enlarging the time to except until the motion can be heard and decided.

Where the Master decides against allowing a claim presented, the proper way of bringing the question before the Court, is by exception to the Master's report.

Where the person who executed a trust deed for the benefit of his creditors, offered, as administrator, to prove a debt due from him to the estate, *held*, that it was incompetent for him to do so; but that the next of kin of the deceased, or others entitled to the money due from him as administrator, might come in and claim under such deed, as his individual creditors.

[1] See Brooks *v.* Mead, *post*, 389.

Suydam *v.* Dequindre.

This was a motion to confirm the report of a Master on a reference to ascertain and report the names of the several creditors, and the amount due to each, under a deed of trust. The facts of the case are sufficiently stated in the opinion of the Chancellor.

E. C. Seaman, for complainants.

A. D. Fraser, for defendants.

The Chancellor. By the 82d rule of the Court, either party, after the Master's report is filed, may enter an order with the Register for its confirmation, unless cause is shown to the contrary within eight days; and if exceptions are not filed and served on the party entering it within that time, the order [*24] becomes absolute of course, without *notice or further order, and the report stands confirmed. The complainants should have proceeded under this rule, instead of making a special motion for a confirmation of the report. The defendants might have successfully opposed the motion on the ground that they were entitled to eight days to file exceptions in, after the order had been entered; but as they relied on other objections, in their opposition to the motion, I will proceed to decide them.

First. It was insisted that the proceedings before the Master were irregular, informal and defective, and should be set aside; and affidavits were read to show that Dequindre, as administrator of the estate of Catharine Dequindre, deceased, presented a claim before the Master, and appeared once or twice before him, when he was taken sick, and several adjournments took place in consequence of his illness; and, he being still unable to attend, an agreement was entered into between the solicitors for an indefinite postponement of the proceedings until Dequindre should be able to appear before the Master. This agreement was not reduced to writing, or noted by the Master in the record of the proceedings before him, and is denied by the affidavit of the complainants' solicitor. It cannot therefore, be noticed by the Court. The 87th rule of the Court

says: "No private agreement or consent between the parties, in respect to the proceedings in a cause, shall be alleged or suggested by either of them against the other, unless the same shall have been reduced to the form of an order, by consent, and entered in the book of common orders; or unless the evidence thereof shall be in writing, subscribed by the party against whom it is alleged or suggested, or by his solicitor or counsel." The affidavits also state that no summons was served on Dequindre, or his solicitor, to bring in objections and for settling the draft of the Master's report. This was not necessary* under the 81st rule, which requires the Master, [*25] when he has prepared the draft of his report, to deliver copies thereof to such of the parties as apply for the same, and to assign a time and place for the parties to bring in objections, and for settling the draft of his report; but no summons is required for that purpose, and the parties must, as the rule now stands, take notice of the time and place at their peril. I think the rule clearly defective in this respect, more especially as, by the seventy-eighth rule, the parties are confined in their exceptions to the report, to the objections taken by them before the Master. I shall so amend the rule as to make a summons necessary hereafter.[1] When the proceedings before the Master have been irregular, his report may be set aside for the irregularity, on motion. An order in such case should be obtained, enlarging the time to except in until the motion could be heard and decided; as an exception to the report pending the motion would be a waiver of the irregularity. *Tyler* v. *Simmons*, 6 Paige R., 127.

Second. Another objection insisted on by the defendants' counsel was, that the Master had decided against the claim presented by Dequindre as administrator. This question should have been brought before the Court on an exception to that part of the Master's report. I think the Master was right in rejecting it. On the 24th October, 1836, Dequindre conveyed to Desnoyers a large amount of real estate and some personal property, in trust for certain creditors named in a schedule annexed

[1] This rule has since been amended.

to the deed of trust, and forming a part of it. Desnoyers was required within a specified time to sell the property, or so much of it as should be necessary to pay the debts and the expenses attending the execution of the trust, and then to reconvey what was left, if anything, to Dequindre. The [*26] complainants filed their bill to compel an execution *of this trust, and there was a reference to a Master to take proof of the debts due the several creditors who had not been paid, and who might elect to come in and take under the deed of trust. Dequindre, as administrator of the estate of Catharine Dequindre, deceased, presented to the Master for his allowance a claim of $3,374.96. This debt in the schedule is stated at about $800. Dequindre claimed this large amount in his representative capacity, and not as the attorney and in the name of the creditors or next of kin of Catharine Dequindre, deceased, to whom the money in fact belongs, and who were the proper persons to claim it, and not Mr. Dequindre. The deed of trust secures nothing to him except the balance of the property after his creditors are paid. The next of kin, or other persons entitled to the money due from him as administrator of the estate of Catharine Dequindre, deceased, are to be considered as his individual creditors, for all the beneficial purposes of the trust, and as standing on the same footing with such creditors; and it is optional with them, as with his other creditors, to come in and claim under the trust deed or not. They may do so, or they may not, as they choose. Mr. Dequindre cannot do it for them, and thereby prevent those creditors who have proved their debts from receiving the whole amount due to them.

Master's report confirmed.

*Justus Ingersoll *v.* Zebulon Kirby & George Kirby. [*27]

Where a date is given, both as a day of the week and a day of the month, and the two are inconsistent, the day of the month must govern.[1]

This was a motion to set aside a Master's report for irregularity.

The Master's summons was dated the 5th of December, 1841, was served on the 6th, and required the parties to appear before him on "*Wednesday, the 7th December.*" Wednesday was the *eighth* of December, and on that day the Master proceeded with the reference. The defendants did not appear on either day.

D. Goodwin, in support of the motion.

A. W. Buel, contra.

The Chancellor. The day of the month and not of the week must govern, when they fall on different days, as in the present case; and the summons was not served in season for the seventh of December, the rule requiring at least two days' service. If the mistake had been in naming the day of the week, that part of the summons might be rejected as surplusage, and the summons still be good, unless the party had been misled by it.

Motion granted.

[1] Where a promissory note bearing date July 20th, was expressed to be payable "one year, August 15th, after date:" *Held*, that the note should be read as if written, "on the 15th day of August, one year after date," or "one year from the 15th of August, after date," either of which is equivalent to "one year from the 15th of August next," and that the note did not mature one year from its date. Washington County Bank *v.* Jerome, 8 Mich., 490.

[*28] *Alfred Williams *v.* Diodate Hubbard *et al.*

There are two classes of cases in which a judgment creditor may come into Chancery for relief. 1st, In aid of his execution at law. 2d, To have his judgment satisfied out of *choses in action*, or other property of the debtor not liable to execution.

In the first class of cases, he must show that an execution has been issued, but it is not necessary to show that it has been returned.[1]

In the second class, the bill must show that an execution has been issued and returned unsatisfied, in whole or in part; and this should be shown by the officer's return.[2]

An officer's return, to be sufficient for this purpose, must be such as, if untrue, would render him liable for a false return.

A return of an execution unsatisfied by direction of the party suing it out, is not sufficient for this purpose.

A judgment creditor's bill may be filed for the double purpose of aiding an execution, and reaching property which is not subject to execution.

A general demurrer will be overruled, unless good as to the whole of the bill.[3]

This was a general demurrer to a judgment creditor's bill.

The bill stated, that in March, 1841, the complainant obtained a judgment in the Circuit Court for the county of Oakland, against the defendants, Hubbard and Cooper, for $209.85, on which he sued out an execution on the 27th of April following, and placed it in the hands of the sheriff, whose return was in these words: "That the said Diodate Hubbard had goods and chattels in his possession on which he had levied, but that said defendant alleged that they were mortgaged and not his

[1] See Beach *v.* White, *post*, 499.

[2] See Smith *v.* Thompson, *ante*, 1; Steward *v.* Stevens, Harr. Ch., 169; Thayer *v.* Swift, id., 430; Stafford *v.* Hulbert, id., 435.

[3] See Barstow *v.* Smith, *post*, 394; Clark *v.* Davis, Harr. Ch., 227; Thayer *v.* Lane, id., 247; Hawkins *v.* Clermont, 15 Mich., 511; Edwards *v.* Hulbert, *post*, 54; Burpee *v.* Smith, *post*, 327; Welles *v.* River Raisin etc., R. R. Co., *post*, 35; Hoffman *v.* Ross, 25 Mich., 175. See, also, Flanders *v.* Chamberlain, 24 Mich., 305.

property, and by direction of the plaintiff he returned the execution unsatisfied, and that said Hubbard and Cooper had no goods and chattels, lands or tenements whereof he could make the said damages and costs or any part *thereof." [*29] The complainant thereupon filed his bill in this Court setting forth the judgment, execution, and return, and charging that Hubbard and Cooper had equitable interests and things in action of the value of $100, and more, that could not be reached by execution at law, &c., and that Hubbard had conveyed certain real estate described in the bill to the defendant Mooney, for the purpose of defrauding the complainant, and his other creditors, and praying a discovery and the appointment of a receiver, and for other and further relief. The defendants demurred.

A. H. Hanscom, in support of the demurrer.

J. B. Hunt, contra.

The Chancellor. There are two classes of cases in which a judgment creditor may come into this Court for relief. *First*. In aid of his execution at law; as to set aside an incumbrance or a transfer of property made to defraud creditors. *Second*. To have his judgment paid out of *choses in action*, or other property of the debtor not liable to execution. *Beck* v. *Burdett*, 1 Paige R. 305. Relief is given in these two classes of cases on different principles. In the first class, on the ground of fraud; and in the other, on the ground that the complainant has exhausted his remedy at law, and that it is inequitable and unjust for the debtor, under such circumstances, to refuse to apply any *choses in action*, or other property belonging to him not liable to execution, in payment of the judgment.

To entitle a party to the aid of this Court in the first class of cases, an execution must have been issued, but it is not necessary that it should have been returned: *Clarkson* v. *DePeyster*, 3 Paige R. 320; *McElwain* v. *Willis*, 9 *Wend. [*30] R. 548; or, if has been, that a new execution has been taken out. The right to come into this Court for relief in this

class of cases, is complete the moment an execution is issued. The fraudulent conveyance then works an injury to the creditor, by hindering and delaying him in the collection of his judgment. But when the creditor asks to have his judgment satisfied out of property belonging to the debtor, not liable to execution, he must show not only that an execution has been taken out, but that it has been returned unsatisfied in whole or in part. This should be shown by the officer's return to the writ, which, to be a good and sufficient return for that purpose, should be such a return as would subject the officer to an action at the suit of the debtor, for a false return, if a bill should be filed against him in this Court, when he had property that might have been levied on and sold to satisfy the execution. The officer's return in the present case shows that Hubbard had goods and chattels in his possession, which were levied on, but that they were mortgaged; and that the execution was returned unsatisfied by the directions of the complainant, and not on the personal responsibility of the officer, as it should have been to make him accountable for a false return. A party suing out an execution, may, if he chooses, direct it to be returned unsatisfied, but he cannot afterwards turn round and sue the officer for a false return, or file a bill in this Court to have his judgment satisfied out of *choses in action* belonging to the debtor. The demurrer would therefore be good, if this were the sole object of the complainant's bill.

It is not unusual for judgment creditor's bills to be so framed as to include the two classes of cases I have mentioned; and there appears to be no objection to such a course. The [*31] debtor might not have sufficient *choses in action* to satisfy the judgment, and in that event it would be necessary to file a second bill to set aside fraudulent conveyances made by him, if the two could not be united in the same bill. The complainant's bill is a bill of this description. There is no special prayer, it is true, to set aside the conveyance from Hubbard to Mooney, but under the general prayer for other and further relief the complainant would be entitled to have it set aside, if it should turn out on the final hearing, to have been

made to defraud creditors. To this part of the bill the demurrer is bad. It must therefore be overruled, it not being a good defense to the whole bill.

Demurrer overruled.

Joseph Russell *v.* Austin B. Waite *et al.*

In applications for opening decrees obtained regularly by default, no general rule can be laid down; but each case must, in a great measure, depend upon its own circumstances, and the sound discretion of the Court.

Such a decree should be opened only under special circumstances, and to promote the ends of justice.[1]

The assignee of a mortgage takes it subject to all equities existing between the parties to it, at the time of the assignment.[2]

An agreement in the nature of a defeasance is required by the Revised Statutes to be recorded, only when it relates to a conveyance, which on its face, purports to be absolute.

This was a petition filed by the defendant Waite, for the purpose of setting aside a decree.

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[1] See Hart *v.* Linsday, *post*, 72. A decree by default may always be opened within a reasonable time on showing an adequate excuse; and this must generally be within the sound discretion of the Court. Brewer *v.* Dodge, 28 Mich., 359.

But an enrolled decree upon default after appearance can be opened for re-examination only by bill of review. Maynard *v.* Pereault, 30 Mich., 160.

As to who will be bound by the proceedings upon the petition to open a decree of foreclosure, see Stone *v.* Welling, 14 Mich., 514.

[2] See Dutton *v.* Ives, 5 Mich., 515; Nichols *v.* Lee, 10 id., 526; Bloomer *v.* Henderson, 8 id., 395; Terry *v.* Tuttle, 24 id., 206, where the mortgage was given to secure a non-negotiable bond.

But where the mortgage is accompanied by a promissory note, and they are assigned before due to a *bona fide* indorsee, he will not be affected by any equities existing between the original parties. Reeves *v.* Scully, *post*, 248; Dutton *v.* Ives, 5 Mich., 515.

But the *bona fide* assignee of a mortgage does not take it subject to any equities between the mortgagor and his grantor, growing out of the fraud of the mortgagor in procuring the title to the land. Bloomer *v.* Henderson, 8 Mich., 395.

[*32] *The bill was filed October 3d, 1840, to foreclose a mortgage, bearing date June 4th, 1838, given by Waite to S. Blanchard, and assigned by Blanchard to the complainant. The bill having been taken as confessed against the defendants, a decree was entered December 7th, 1841, and the mortgaged premises were advertised to be sold March 18th, 1842, at which time the sale was adjourned. The facts, as they appear from the petition, the affidavit of P. R. Adams, and the answer which the defendant Waite wished to put into the bill, were as follows: The mortgage was given to secure the purchase money of the mortgaged premises, which had been purchased by Waite of Blanchard. The parties at the same time entered into a written agreement, under their hands and seals, which was drawn up by Adams, and left with him for safe keeping. By this agreement, Waite bound himself to build a tavern-house on the mortgaged premises by January 1st, 1839; and Blanchard bound himself, at the election of Waite, who was to give him notice thereof on or before November 1st, 1839, to put in as common stock, which should be held by them according to their respective interests, the land he had conveyed, against the improvements to be made by Waite; the land to be put in at $3,000, and the improvements at a valuation to be made by disinterested persons. At the solicitation of Blanchard, the tavern-house was built three stories high, instead of two, as was required by the original agreement, and the time to build it in was extended to April 1st, 1839, when it was completed; and Waite, both on and before November 1st, notified Blanchard of his election to turn the property into common stock under their agreement, and requested him to select disinterested persons to appraise the improvements. On February 4th, 1839, Blanchard assigned the mortgage to the complainant as collateral security [*33] for the *payment of certain notes the complainant held against him; but Waite knew nothing of the assignment until a few days previous to November 1st, 1839. Soon after the complainant had filed his bill, Waite went to Adams, who was his attorney, for advice, and Adams told him there was no

use in putting in any answer to the bill, as it would be of no benefit to him. Nothing was said at the time about the agreement between Waite and Blanchard. Waite did not make any mention of it, as it had been drawn up by Adams, who knew its contents, and had been left with him by the parties for safe keeping, and was then in his possession. After the mortgaged premises had been advertised for sale by the Master, Waite called on Adams again, and requested to see the agreement, when Adams told him it had been delivered up a long time before; but on examining his papers he found it was still in his possession. Adams had got the impression that the contract had been delivered up from several conversations he had had with Waite and Blanchard in November, 1839, when they were endeavoring to settle the matter between them; and under that impression he had given to Waite the advice above stated.

T. Romeyn, in support of the petition.

Barstow & Lockwood, contra.

The Chancellor. No general rule can be laid down by the Court to govern it in applications of this kind. Each application must depend, in a great measure, upon its own circumstances, and the sound discretion of the Court. A decree, regularly obtained against a party by default, should not be opened, unless under special circumstances, and then only to promote the ends of justice. Russell took the mortgage subject to all equities existing *between the mortgagor [*34] and mortgagee at the time it was assigned to him. *Livingston* v. *Dean*, 2 J. C. R., 479; *Murray* v. *Lilburn*, id., 441; *James* v. *Morey*, 2 Cow. R. R., 246. He stands in the place of Blanchard, and his rights under the assignment are the rights of Blanchard under the mortgage, and nothing more.

There was no necessity for recording the agreement, which is in the nature of a defeasance. The Revised Statutes, (page 261, § 32,) refer to conveyances purporting to be absolute upon their face, and not to mortgages.

Waite was misled by his counsel, who advised him under a misapprehension of the facts; and I do not think the time that elapsed between the discovery of the error and the service of a copy of his petition, with notice of this motion, on the complainant's solicitor, should prejudice the present application. The copy and notice were served on May 14th, and Waite did not discover the error into which he had been led by his counsel, until after the mortgaged premises were advertised for sale.

Let the decree, and the order to take the bill as confessed, be vacated on Waite's paying to the complainant's solicitor all taxable costs subsequent to, and including the order to take the bill as confessed, and a counsel fee of ten dollars. The order to take the bill as confessed, not to be vacated as against the other defendants.

[*35] *John A. Welles & Samuel B. Knapp *v.* River Raisin and Grand River Railroad Company *et al.*

Where the charter of a bank prohibited the discounting of notes for stockholders to pay installments on their stock, and a note for $70,000 and a certificate of deposit on which $12,000 was due, were discounted to enable an individual to purchase a controlling interest in the bank, and to pay the balance due the bank on the stock purchased by him, and a bill was filed to restrain a suit brought by the bank on the note, and to have the note and certificate given up and canceled; upon demurrer it was *held*, that the bill should not be sustained, and that the parties should be left to their remedy at law.

Where a bill is filed for relief, the discovery is ancillary, and a demurrer which is good to the relief is good to the discovery.

Where a complainant, entited to discovery only, goes on to pray relief in addition, his whole bill is demurrable.[1]

Where relief has been refused to a party in this Court on account of the illegality of a transaction, the Court will not aid him at law.

[1] See Willaims *v.* Hubbard, *ante.*, 28, and cases cited in note.

THIS was a hearing on general demurrer.

The bill was filed to stay proceedings at law, and to have a certain note and certificate of deposit delivered up to be canceled.

The bill states, that, by the act incorporating the River Raisin and Grand River Railroad Company, the stockholders were authorized to establish a bank at Tecumseh, with a capital of $100,000, to be divided into 2,000 shares of $50 each; the stockholders of the bank to be a body corporate by the name of the President, Directors and Company of the Bank of Tecumseh. That the bank was to be managed by the president and directors of the railroad company, who, before the bank went into operation, were to convey to it the entire stock of the railroad as security for the payment of the notes and debts *of the bank. That the bank was established, and [*36] its stock all taken except 300 shares. That in January, 1838, Dan B. Miller was the owner of 1100 shares of this stock, on which there had been paid in the sum of $15 on each share, amounting in all to the sum of $16,500. That about this time the complainant Knapp entered into a negotiation with Miller for the purchase of his stock and the controlling interest in the bank, and the following agreement was concluded between Knapp and Miller, viz: Miller was to transfer his 1100 shares of bank stock, and a majority of railroad stock to Knapp, who was to pay him $16,500 for the bank stock, and $10,000 for the railroad stock, making in all the sum of $26,500. Bill alleges that the bank stock was at the time below par, and that Knapp agreed to pay the $10,000 only in consideration of getting a majority of the railroad stock, which, by the charter, controlled the bank stock. That February 1st, 1838, Knapp took the bank, and delivered to George W. Germain, the cashier of the bank, a certificate of deposit of the Bank of Wisconsin for $70,000, and a joint and several promissory note made by Samuel B. Knapp and John A. Welles, the complainants, and Jira Payne, for $70,000, dated January 31st, 1838, payable to the president, directors and company of the bank, one day after date, with interest. Fifty-eight thousand dollars were cred-

ited on the certificate of deposit as having been settled or paid, and then the note for $70,000 and the certificate of deposit for the balance due upon it, which was $12,000, were discounted by the bank, and the avails credited upon its books to the complainants and Payne. That the cashier of the bank, on the same day, delivered to Miller promissory notes and other securities, which had been discounted by the bank for his benefit, to the amount of $24,528.61, which, with the sum of $453.39, the interest and prof-
[*37] its *on the same, was charged to the account of the complainants, and that, at the request of Knapp, Miller transferred the eleven hundred shares of bank stock to the following persons, who, as the bill alleges, held the same in trust for Knapp and subject to his order, viz: to Henry T. Stringham, seven hundred shares, on which there had been paid in $10,500; to the complainant, John A. Welles, three hundred and fifty shares, on which there had been paid in $5,250; and to Jira Payne, fifty shares, on which there had been paid in $750; making an aggregate of payments on said eleven hundred shares of stock, of $16,500. That the balance of the $26,500, after deducting the aforesaid amount of promissory notes, etc., was paid to Miller by Knapp. States that Miller had not assigned a majority of the railroad stock to Knapp; that he had never had the control of a majority of the railroad stock, and that the individuals who had the control of the same, at the time the note and certificate of deposit were discounted, were the directors of the bank, and that they had refused to transfer the same to Miller, or to the complainants, or either of them, or to enable Miller to do so. Charges that the promissory note and certificate of deposit were discounted and received by Germain in payment of the installments due on the eleven hundred shares of stock, and with the intent of providing the means of furnishing such payment and other payments on said stock, and enabling Miller to withdraw the notes and money which had been paid in on his stock. That Germain knew of the contract between Knapp and Miller; that he knew the object for which the note and certificate were offered for discount; that he knew Miller

had not the control of the railroad stock, and could not procure it; and that, with a knowledge of these facts, he received and discounted the note and certificate, and gave up to Miller the notes and other securities above *stated. That the [*38] $70,000 promissory note was made by the complainants and Payne, solely with the view of enabling Knapp to have the means of carrying out his agreement with Miller, and of having it discounted at the bank; that the certificate of deposit was obtained for a like purpose, and that neither of the complainants, at the time the note and certificate were discounted, had any knowledge or notice that Miller could not carry out his agreement with Knapp, but that the president and directors of the bank had full knowledge thereof through their cashier, George W. Germain. The bill further states that Stringham, Welles and Payne were severally credited with such part of the avails of the promissory note and certificate of deposit, as was necessary to pay the remaining installments due on the stock held by them respectively, and that the three hundred shares of stock which were not taken when the bank commenced operations, were subscribed for by Payne, and stood in his name, and that he was credited with $15,000 of the avails of the discounted note and certificate to pay for it. That the bank had sued Welles on the $70,000 note, and the complainants filed their bill to restrain the proceedings at law, and to have the note and certificate of deposit given up and canceled, on the ground that the bank, by discounting the note and certificate of deposit, for the purposes aforesaid, had exceeded its powers, and violated the twenty-second section of its charter, and that Miller was guilty of fraud in undertaking to transfer to Knapp a majority of the railroad stock, when it was not in his power to do so, and that the directors of the bank had notice of the fraud through Germain, their cashier, when the note and certificate were discounted.

The defendant put in a general demurrer to the bill

*T. *Romeyn*, for complainants. [*39]

*A. D. *Fraser*, for defendants.

The Chancellor. By the twenty-second section of the act incorporating the railroad company, and authorizing the establishment of the bank, one-tenth part of the amount of each share of bank stock is required to be paid in specie at the time of subscribing, and the balance in such installments, and at such times, as the directors should require, they giving sixty days' notice thereof, and no one installment to exceed five dollars on a share. It is also provided, by the same section, "that no note or other evidence of debt shall be discounted or received by the directors, in payment of any installments called in or required to be paid, with intent to provide the means of furnishing such payment, or with intent of enabling any stockholder to withdraw any part of the money paid in by him on his stock." This express prohibition against discounting a note to enable a stockholder to pay in his stock, was designed to secure the bill-holders of the bank, and its other creditors, against losses which they might otherwise sustain by the substitution of stock notes in the place of actual capital. The discounting of the note and certificate of deposit for the purposes stated in the bill, viz., to enable Knapp to purchase Miller's stock, and pay the bank what was still due on it, (but $15 having been paid on a share,) and to enable Payne to subscribe and pay for the three hundred shares which were not taken when the bank was put into operation, was a clear and palpable violation of this part of the act, and a fraud upon the law under which the bank was established. Knapp must have known at the time that the officers of the bank had no right, under its char-
[*40] ter, to discount the note and certificate *for such a purpose. The whole transaction appears to have been gone into to give him the ownership and control of the bank. But it is wholly immaterial whether he had such knowledge or not. The act of incorporation is a public law, of which he was bound to take notice. Are the complainants, on this statement of their case, entitled to relief in this Court? In *Woodworth* v. *Jones*, 2 Johns. Cas., 417, the parties had been guilty of maintenance, in buying and selling a pretended title to land, and it was held equity would not relieve either of them, but would

leave them to their remedy, if any, at law. Such must be the decision in this case. To give relief under the facts and circumstances stated in the bill, would, it seems to me, be a perversion of justice, and an encouragement to bankers to commit frauds upon the public, through the improper management of the moneyed institutions under their control.

In *Bolt* v. *Rogers*, 3 Paige R., 157, Chancellor Walworth says: "Wherever two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of those persons, as against the other, from the consequences of their own misconduct."

The bill cannot be sustained as a bill of discovery merely. When a bill is filed for relief, the discovery is ancillary, and a demurrer that is good to the relief is also good to the discovery. The rule is well established in England, that, if the complainant is entitled to discovery only, and the bill goes on to pray relief in addition to the discovery, the whole bill may be demurred to. Coop. Eq. Pl., 188; 3 Ves. R., 7; 10 id., 553. The rule is otherwise in the State of New York. The English rule, however, I think preferable, as it keeps up a proper distinction between bills for relief and bills for a discovery only. The Court *should not be required to examine [*41] the complainant's case twice over; first, to ascertain whether he is entitled to relief; and, if not, then to see whether the bill can be retained as a bill for a discovery only.

But again. Would this Court aid a party at law, to whom it had expressly refused to give relief in this Court,—not for want of jurisdiction, but on account of the illegality of the transaction? There can be but one answer given to such a question.

Demurrer allowed, and bill dismissed with costs.

Stevens *v.* Brown.

The legal title to lands mortgaged is in the mortgagee, who may, at any time after default, if not before, unless the mortgage provides that the mortgagor shall retain possession, put him out by ejectment.[1]

When the mortgagor comes with his money to redeem, the mortgagee must account for the profits of the mortgaged premises, of which the crops which he may have appropriated or destroyed, will be considered a part.

This was a motion to dissolve an injunction.

The bill states that the complainant, in 1839, mortgaged certain premises to the defendant, who, after the mortgage money became due, foreclosed the mortgage at law, and, on May 14th, 1841, obtained a deed. That the statutory foreclosure was irregular and void, but that the defendant, by virtue of the deed, had entered upon the land, and commenced ploughing it, and had destroyed the complainant's crops growing upon it; and that the complainant was ready and willing to pay what was due on the mortgage.

[*42] *An injunction had been allowed, restraining the defendant from exercising further acts of ownership over the land, which injunction the defendant now moved to dissolve.

S. Barstow & A. H. Hanscom, in support of the motion.

A. Davidson, contra.

The Chancellor. In disposing of this motion, it is not necessary to inquire into the validity of the statutory foreclosure. Considering the defendant in the light of a mortgagee, this Court will not prevent him from taking possession of the mortgaged premises. The legal title to lands mortgaged is in the mortgagee, who may at any time after a default in the payment

[1] See note 1 on next page; Mundy *v.* Monroe, 1 Mich., 68; Hoffman *v.* Harrington, 33 id, 392; Dougherty *v.* Randell, 3 id., 581; Albright *v.* Cobb, 34 id., 316.

of the mortgage money or any part thereof, if not before, where the mortgage does not provide for the mortgagor's retaining possession until that time, put the mortgagor out of possession by ejectment.[1] 4 *Kent's Com.* 155, *and cases there cited.* At law, the defendant has a right to the possession of the mortgaged premises, and equity will not take from him that right. It is sufficient that the mortgagee must account for the profits of the mortgaged premises, when the mortgagor comes with his money to redeem; and if he appropriates to his own use, or destroys the crops growing on the premises when he takes possession, he must account for them as a part of the profits.

Injunction dissolved.

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*Levi Brown *et al. v.* Thomas Chase *et al.* [*43]

Before appointing a receiver to take charge of mortgaged premises, in a suit for the foreclosure of a mortgage, the Court must be satisfied, *first*, that the premises are insufficient to pay the debt; and, *second*, that the party personally liable is insolvent, so that an execution for the balance due after sale would be unavailing.

A security is presumed sufficient, until the contrary is shown.

A neglect to apply for a receiver within a reasonable time, is construed into a waiver of the right to make such application.

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[1] Subsequent to this decision, on March 8th, 1843, it was enacted by the Legislature of this State, "That no action of ejectment shall hereafter be maintained by a mortgagee, or his assigns or representatives, for the recovery of the mortgaged premises, until after a foreclosure of the mortgage, and the time of redemption thereof shall have expired." *Laws* 1843, p. 139, (Comp. Laws, § 6263).

This statute has been held unconstitutional as to mortgages previously executed: Mundy *v.* Monroe, 1 Mich., 68; Blackwood *v.* Van Vleet, 11 id., 252; Newton *v.* McKay, 30 id., 380.

As to the effect of this statute, see Baker *v.* Pierson, 5 Mich., 456; Caruthers *v.* Humphrey, 12 id., 270; Crippen *v.* Morrison, 13 id., 23; Newton *v.* Sly, 15 id., 91; Hogsett *v.* Ellis, 17 id., 351; Newton *v.* McKay, 30 id., 380; Humphrey *v.* Hurd, 29 id., 44.

Brown *v.* Chase.

This was a petition for the appointment of a receiver of the rents and profits of mortgaged premises.

The complainants filed their bill to foreclose a mortgage August 13th, 1839. Davis, one of the defendants, put in his answer April 3d, 1841, admitting the rights of complainants, and the amount due on the mortgage, and the bill was taken as confessed against the other defendants. The amount due May 10th, 1841, for principal and interest, was $16,465.87. The petition stated that Chase, the mortgagor, had been decreed a bankrupt under the act of Congress, and that the mortgaged premises, with the appurtenances, were a slender and scanty security for the amount due on the mortgage. To show the value of the premises, numerous affidavits were read.

E. B. Harrington, for petitioners.

Wm. Hale & H. N. Walker, contra.

The Chancellor. A receiver of the rents and profits of mortgaged premises is sometimes appointed on the peti-
[*44] tion of the mortgagee, after he has filed his bill to *foreclose the mortgage. The Court must be satisfied, before making the appointment, that the mortgaged premises are insufficient to pay the mortgage debt, and that the mortgagor, or other party to the suit who is personally liable for its payment, is insolvent, or out of the jurisdiction of the Court, so that an execution against him for the balance that should remain due after a sale of the mortgaged premises, would be unavailing. Chase, the mortgagor, who is personally liable for the payment of the debt, has been decreed a bankrupt on his own petition. So far the complainants have made out their case; but they have failed to satisfy the Court that the mortgaged premises are insufficient to pay the mortgage debt. The security was one of their own taking, and the presumption is that it is sufficient, until the contrary appears. To sustain their application, they have produced the affidavits of fifteen different persons to the value of the mortgaged premises. The sev-

eral valuations of these individuals range from $14,500, to $18,000. On the other hand, the defendants have produced the affidavits of sixteen or more individuals, whose several valuations range from $22,000, to $30,000. A majority of the persons last mentioned, value the premises at $25,000 or more. The Court cannot say, under such circumstances, that the mortgaged premises are insufficient security.

The complainants have come too late with this motion. They filed their bill August 13th, 1839, nearly three years ago, and, for aught that appears from their petition, might, with due diligence, have obtained a decree long before this time, and had the mortgaged premises sold. If they were entitled to a receiver, their neglect to apply for his appointment at an earlier day, should be construed as a waiver of their right.

Motion denied.

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*George Ward *v.* Samuel P. Jewett. [*45]

Where a defendant permits a bill to be taken as confessed against him, it is an admission on his part of every material fact stated in it.[1]

If the defendant wishes to controvert any allegations in the bill, he should put them in issue by plea or answer, and neglecting this, he is precluded from introducing evidence for that purpose before the Master, on a reference.

Where a Master erroneously refuses to receive testimony, the proper way to correct it is by motion to the Court for an order compelling him to receive the evidence, and not by excepting to his report.[2]

If the allegations in a bill are sufficiently clear and positive to establish a fact without proof, it need not de adduced; otherwise, where they are vague and indefinite.

Where complainant was compelled by the improper conduct of the defendant, and without fault of his own, to come into Court for a settlement of partnership accounts, he was held entitled to costs.

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[1] And defendant cannot, in such case, be charged with costs of testimony in support of the bill. Covell *v.* Cole, 16 Mich., 223.

[2] See Schwarz *v.* Sears. *ante*, 19 and note.

This was on exceptions to a Master's report on a reference to take and state an account between the parties as copartners.

The Master, in stating the account between defendant and the copartnership, charged him with $79.01, the amount of a judgment which, it was stated in the bill of complaint, he had received for the copartnership. The defendant offered to prove that the money was received by him on his own account, and not for the copartnership; but the Master refused to hear evidence for that purpose, as the bill, which had been taken as confessed, alleged that he had received it on a copartnership debt. The defendant excepted to so much of the Master's report as charged him with the $79.01; *first*, because the Master refused to hear the evidence; and, *second*, because he allowed the charge on the allegations of the complainant's bill, without other proof.

[*46] * *G. Miles*, for complainant.

O. Hawkins, for defendant.

The Chancellor. The defendant was properly charged with the $79.01. Instead of answering the bill, he let it be taken as confessed. That was an admission on his part of every material fact stated in it. If he had wished to controvert the truth of any of the allegations of the bill, he should have put them in issue by plea or answer; and not having done so, he was precluded from introducing evidence for that purpose before the Master.

When the Master has erroneously refused to receive testimony, the way to correct the error is by a motion to the Court for an order requiring him to receive it, and not by exceptions to the report. *Schwarz* v. *Sears*, *ante*, 19.

The only remaining question is, whether the allegations of the bill were sufficient to charge the defendant, without further proof. The rule on this subject is this: If the allegations are sufficiently clear and positive to establish a fact without other proof, it need not be adduced; but if they are vague and indefinite, further proof should be given. *Williams* v. *Corwin*,

Hopk. R., 471. On looking into the bill, I am satisfied the allegations are sufficient. The bill states that the defendant received of Josiah P. Jewett, who owed the copartnership between two and three hundred dollars, a promissory note against one Edward F. Gay, for $75, or thereabouts, to be applied on the partnership debt, and that he subsequently obtained a judgment for $75.33 on the note, which judgment was collected by him, and applied to his own use. These facts are so clearly stated in the bill, as to leave no doubt the defendant would have put them in issue, if he could have denied them under oath. He must have been aware of *the extent [*47] of the admission he was making when he permitted the bill to be taken as confessed against him.

Exceptions overruled, and Master's report confirmed

A question subsequently arose concerning the costs in the suit, when the following opinion was delivered by the Court.

The Chancellor. It appears by the original and supplemental bills, both of which have been taken as confessed, that the defendant was altogether in fault; *first*, in refusing to apply the money he had received on the judgment against Gay, upon the copartnership debt due from Josiah P. Jewett; and, *secondly*, in taking and retaining possession of the books of account mentioned in the supplemental bill, which was the cause of the filing of that bill. The complainant was compelled by the improper conduct of the defendant, and without any fault of his own, to come into this Court for a settlement of the copartnership business; and he must recover his costs against the defendant. *Caldwell* v. *Leiber*, 7 Paige R., 483.

[*48] *Harriet Sawyer *v.* Leander Sawyer.

Practice in chancery in regard to the impeachment of witnesses the same as at law.

Before the credit of a witness can be impeached by proof of inconsistency in his declarations, a foundation must be laid by questioning him on cross-examination as to his former statements, that he may have an opportunity for explanation.[1]

Having laid this foundation, a party may proceed without exhibiting articles of impeachment.

Each party must pay for taking down the cross-examination of his adversary's witnesses, as well as the direct examination of his own.

A witness having been examined, after his examination is closed cannot be examined as to the same facts without an order of the Court; but he may be as to other facts, or new matter arising out of the testimony of other witnesses.

Divorce will not be granted upon the admission of a party unsupported by evidence, but the amount of evidence required varies with the danger of collusion.[2]

This was a petition for divorce from the bonds of matrimony, on account of extreme cruelty.

Miles & Wilson, for petitioner

Mundy & Fletcher, for defendant.

The Chancellor. There are several questions of practice which it is necessary to decide, before proceeding to the merits of the case.

1. Some of the defendant's witnesses, on their cross-examination, were questioned as to statements previously made by

[1] He must also be examined as to the time, place and person involved in the supposed contradiction. Smith *v.* The People, 2 Mich., 415.

A witness cannot be impeached by proof of contradictory statements concerning immaterial matters about which he has been questioned. Dunn *v.* Dunn, 11 Mich., 284. See, also, Fisher *v.* Hood, 14 Mich., 189.

[2] Nor will a decree be rendered by consent without evidence. Robinson *v.* Robinson, 16 Mich., 79.

them at variance, or inconsistent with what they had sworn to on their direct examination, for the purpose of impeaching them.

2. Witnesses were examined by the petitioner to impeach* the defendant's witnesses, without filing articles, [*49] and obtaining an order of the Court for that purpose.

3. Witnesses who had been examined by the petitioner, were afterwards re-examined to impeach the defendant's witnesses, without any order of the Court for their re-examination.

These several objections were taken before the Master, and and renewed at the hearing by the defendants' counsel.

The practice in this Court in the examination of witnesses, differs essentially from the practice of the Court of Chancery in England. By the English practice the examination is in secret, neither the parties nor their counsel being permitted to be present; and the examination is on written interrogatories. With us, the examination is in the presence of the parties, and their counsel, and such other persons as choose to attend; and the witnesses are examined and cross-examined by the counsel of the respective parties, as in a trial at law, in the presence of the Master who takes down their testimony. The benefits of this mode of examination more than counterbalance its evils. It is better calculated to elicit truth than a secret examination on interrogatories drawn, as they frequently must be, without a full knowledge of what the witness knows; and it secures more fully the benefits of a cross-examination, which must ever be defective when on interrogatories drawn up without a knowledge of what the witness has sworn to upon his direct examination. Nor can written interrogatories be as effectual in extracting the truth from an unwilling witness as a *viva voce* examination, where the questions may be so varied, and with such nice shades of difference as to deprive the witness of every possible loophole to evade telling the truth, without committing perjury, and subjecting himself to a criminal prosecution. These are some of the advantages attending *our [*50] practice, whatever may be its defects; but its benefits

would, to some extent, be lost, if a witness could not be asked on his cross-examination, whether he had not represented differently, at other times, the facts to which he had sworn upon his direct examination. This is everyday's practice at law. The credit of a witness at law cannot be impeached by proof that he has said or declared anything inconsistent with the evidence he has given, unless a foundation for the introduction of such evidence is first laid, by asking him upon his cross-examination whether he has not made such statement or declaration, that he may have an opportunity to explain his conduct. The Queen's Case, 2 Brod. & Bing., 310. (S. C., 6 Eng. Com. Law R., 112.)[1]

A different rule in this Court would have one of two effects; it would either take from a party his right to impeach a witness in this way, or from the witness his right to admit under oath the declarations or statements he had made, and to state his reasons for making them, thereby rendering it unnecessary in all cases to examine other witnesses to prove the fact. Under our practice the rule at law on this subject should be the rule of this Court.

The petitioner, having laid a foundation for impeaching the defendant's witnesses, was at liberty to do so without exhibiting articles for that purpose. The English practice has never been adopted by this Court. An instance is not known, in which articles to impeach the credit of a witness have been exhibited. The reason does not exist under our practice, that obtains under the practice of the English Court of Chancery, where a party, from the secret manner in which the evidence is taken, cannot know till publication what his adversary's witnesses have sworn to, and it is then too late for him to take further proofs in the cause without leave of the Court. Some [*51] evils, it is *true, may grow out of this practice. It may open too wide a door for cumbering a cause with voluminous testimony, much of which may not be worth the taking,

[1] See also further, 1 Stark. Ev., 183; Angus *v.* Smith, 1 Mood. & Malk. 473; (S. C. Eng. Com. Law. R., 360.)

and in that way retard the dispatch of business by the Court. The expense of taking testimony will, however, to some extent, check this evil. Each party must pay for taking down the cross-examination of his adversary's witnesses, as well as the direct examination of his own; and a protracted direct or cross-examination on immaterial facts, by either party, would only increase his expenses, without occasioning a corresponding benefit to himself or injury to his opponent.

After a witness has been once examined and his examination has been closed, he cannot be re-examined to the same facts, unless by order of the Court; but he may be re-examined as to facts to which he has not been examined, or to new matter arising out of the testimony of other witnesses. 1 Hoff. Ch. Prac., 464; *Swinford* v. *Horne*, 5 Madd. R., 379.

Having disposed of these preliminary questions, I proceed to the merits of the case. Two objections were made by the defendant's counsel to granting the prayer of the petitioner; *first*, to the character of the evidence, which, it was said, consisted entirely of the admissions or confessions of the defendant, and that the Court should not grant a divorce on such testimony, unsupported by other evidence; *secondly*, that the petitioner was as much to blame as the defendant, and was therefore entitled to no relief, the statute providing that no divorce shall be granted where the party complaining is guilty of the crime set forth in his or her petition.

In *Baxter* v. *Baxter*, 1 Mass. R., 345, it was held that the confessions of the party, uncorroborated by other circumstances, were inadmissible to prove the fact of adultery. *In *Holland* v. *Holland*, 2 Mass. R., 154, which was [*52] also a case of divorce for adultery, the Court say: "The rule is established by uniform practice that the confession of the party, unsupported by other evidence, is not sufficient to ground a divorce upon." In *Betts* v. *Betts*, 1. J. C. R., 197, which was a bill for a divorce, charging the defendant with adultery and cruel treatment, the Chancellor said, it "is well settled, that the confessions of the party are admissible on a charge of adultery, *if supported by other proof;* but unless

corroborated by other evidence and circumstances, they are not sufficient ground for a decree." In cases of adultery, the right to a divorce consists in the proof of a single fact, and if the confessions of the party were to be received as sufficient proof, there would be danger of collusion. It is to guard against this, that other proof is required in corroboration of the defendant's confessions. The same rule must apply to confessions as evidence in all other cases of divorce from the bonds of matrimony, with this limitation, that, where there is less danger of collusion, or it could not be practiced so easily, the corroborating facts or circumstances need not be of so decisive a character. The object of the rule is to guard against collusion, not to obstruct the administration of justice. Where the circumstances of the case are such as to repel all suspicion of collusion, and leave in the mind of the Court no doubt of the truth of the confessions, it should act accordingly. The evidence in the present case is voluminous, and somewhat contradictory. But, if the defendant's admissions, made at different times and to different individuals, under circumstances that repel everything like collusion, are worthy of credit,—and it seems to me there can be no doubt on the question,—his cruel treatment of the petitioner is fully made out. His admissions of [*53] personal violence to her, both before and after *she had left him the first time on account of his ill treatment, are clearly proved; and corroborated in one instance by marks of violence seen upon her face, to which several witnesses have testified. This was before she left him the first time; and, when she left him the last time, it was on account of personal violence. His confession of this fact, as well as of abusing her, and using indecent and cruel language to her, is proved by several witnesses. Mr. Lerned in his testimony says, that he admitted he kicked her on the morning she left his house, and that he turned her out of doors.

The defendant has failed to show that she was guilty of like cruel treatment of him. The evidence of the only witness examined for that purpose, is too inconsistent with the previous statements made by the same witness to third persons, to entitle it

to much credit, supposing it in other respects to be sufficient to make out a defense under the statute, which I think is not the case.

The Court will reserve the question whether the decree to be entered in this cause shall be for a divorce from the bonds of matrimony, or from bed and board only, until the next term of the Court. This is done, as there is doubt whether the Court can grant alimony, in case a decree should be entered dissolving the bonds of matrimony,[1] and that the parties may have an opportunity to adjust their difficulties between themselves before that time, should they be disposed to do so.

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*Thomas Edwards *v.* John Hulbert. [*54]

Where, by treaty between the United States and the Ottawa and Chippewa Indians, the sum of $300,000 was set apart to pay claims against the Indians, to be allowed by commissioners, and, E. having a claim against them, H. procured its allowance to himself as purchaser of the claim, when he had no right to it, and received the money, *it was held*, that E. could not sustain an action at law against H. for the money, but that in equity H. would be considered a trustee for E. to whom the money of right belonged.

Where a defendant who should have demurred to discovery only, demurs to both discovery and relief, his demurrer will be overruled.[2]

This was a demurrer to the bill of complaint.

The bill states that the complainant was an Indian trader at the Saut de Ste Marie. That in 1826 he had a claim of $340 against the Ottawa and Chippewa Indians, for goods sold to them, and for goods wrongfully taken by them. That, in 1836, a treaty was made between these Indians and the Government

[1] The law is now amended so that alimony may be granted "upon divorce for adultery, committed by the husband, or on account of his being sentenced to confinement to hard labor, or for any other cause. *Laws* 1843, *p.* 7.

[2] Burpee *v.* Smith, *post*, 327.

of the United States, providing, among other things, that the Indians should pay all proper and just claims existing against them, which should be allowed by commissioners to be appointed by the Government; and $300,000 was set apart by the treaty for that purpose. In September, 1836, the commissioners met at Mackinac, and the defendant procured the allowance of the aforesaid claim of $340 to himself, in the following words: "Of the total loss by Thomas Edwards, in 1826, amounting to $340, which comes to the claimant by purchase, and there is evidence the articles were supplied to the Indians in the ceded district. It must therefore be allowed." The bill charges that the defendant had received the $340 and applied it to his own use, and that he had no right to, or interest whatever in the claim,
[*55] *which belonged to the complainant, but which the defendant had procured to be allowed to himself by the commissioners. The defendant demurred.

J. F. Joy, in support of the demurrer.

J. S. Abbott & A. D. Fraser, contra.

The Chancellor. The first objection taken to the bill is that the complainant has a remedy at law. I know of no case, and none was cited by the defendant's counsel, in which a court of law has carried the action for money had and received so far as to reach the complainant's case. The sum of $300,000 was set apart by the treaty to pay such claims against the Indians as should, on examination, be allowed by the commissioners. A mere claim against the Indians could give no right or interest in this fund, to acquire which, the party must have his claim allowed by the commissioners, and then, and not before, he would have an interest in the fund to the amount allowed him. The $340 were allowed to the defendant, and not to the complainant, and, as it is the allowance by the commissioners, and not the pre-existing debt against the Indians, that in law gives a right to the money, I think courts of law would have to go much further than they have heretofore gone, to give redress in such a case. If the claim had been allowed

to the complainant, and the defendant had received the money, the case would have been different. The complainant's remedy would then have been at law, and not in this Court. Taking the facts as stated in the bill to be true, the defendant must be considered in equity in the light of a trustee, and as having presented the claim to the commissioners, obtained its allowance, and received the money upon it, in trust for the complainant.

*Another objection is, that the bill charges the defend- [*56] ant with an indictable offense, in obtaining money under false pretenses. I do not think so; and, even if it did, the demurrer is too broad for the defendant to avail himself of the objection. It is to both discovery and relief, whereas it should have been confined to the discovery alone, and to such parts of the bill as implicated the defendant, *Robinson* v. *Smith*, 3 Paige R. 231; *Kuypers* v. *The Reformed Dutch Church*, 6 Paige R. 570.

Demurrer overruled.

Oliver Bronson *et al. v.* Cogswell K. Green *et al.*

Contracts are to be construed according to the intention of the parties, as expressed in them.[1]

Where several contracts are executed by the same parties at the same time, and relating to the same matter, they are to be construed together.[2]

Where one writing refers to another, the intention of the parties is to be gathered from the two construed together.

Where one contract grows out of another to which it refers, and both are in writing, the first may be looked into to ascertain the intention of the parties in the latter, if it is not clearly expressed therein.

[1] See Bird *v.* Hamilton, *post*, 361; Norris *v.* Showerman, *post*, 206; s. c. 2 Doug., 16.

[2] Norris *v.* Hill, 1 Mich., 202; Dudgeon *v.* Haggart, 17 id., 275, 280, where the cases are fully collected.

In construing an instrument, the whole of it should be considered together,

Bronson *v.* Green.

This was a hearing on demurrer to a bill for specific performance.

The bill states that on November 5th, 1835, articles of agreement were entered into between the complainants and Green, one of the defendants, for the purchase of real estate in Michigan, Wisconsin, Indiana, and Illinois; that the complainants [*57] were to furnish the money, and Green, *as their agent, was to invest it in the purchase of such real estate as he might select, the title to which was to be taken in the name of the complainants. Green was to have charge of the lands after they had been purchased, pay the taxes thereon, and sell them to the best advantage for the complainants, and close his agency within five years, unless further time should be given him for that purpose. That, for his services, he was to receive one-third of the profits, after repaying to the complainants the money advanced, with interest and expenses; and he guarantied to the complainants the repayment of all moneys invested by him, and all costs, charges and disbursements incident to the investment, with interest on one-third part thereof, at the expiration of five years. Green was to pay over to the complainants, from time to time, all moneys received by him on sales, etc., which moneys were to be applied by them in payment of what they had advanced: and all questions that might arise concerning the management or disposition of the lands, or the manner of conducting sales, whether for cash or credit, were to be settled by a majority in interest. On the first day of January, 1839, the complainants had advanced to Green on the aforesaid contract, including interest, $12,310.60. On the 24th day of June, in the same year, the parties entered into another contract, a part of which is in these words: "Memorandum of an agreement entered into this 24th day of June, A. D. 1839, between Oliver Bronson and

and a construction of a detached part, without reference to the rest, is erroneous. Norris *v.* Showerman, *post*, 206, s. c., 2 Doug., 16; Bird *v.* Hamilton, *post*, 361; Paddock *v.* Pardee, 1 Mich., 421.

But there is no presumption of law that parties will always make the same terms for their contracts. Each must stand by itself unless they are actually connected, or referred to in the course of dealing. Hinman *v.* Eakin, 26 Mich., 80.

Arthur Bronson, of the first part, and C. K. Green, of the second part, witnesseth, that the said parties of the first part covenant and agree, that the lands and lots purchased under a certain contract between the said parties of the first and second part, dated November 5th, 1835, shall be exposed for sale, at public vendue, on the first day of October next, at Niles, in Michigan, or at such other place as said Green *may [*58] elect, in Illinois or Michigan, on the following terms of payment: one-fourth cash on the day of sale, the residue in three equal annual payments, with interest annually, at seven per cent. per annum, no sale to be made of quantities less than eighty acres, nor shall any lands be sold for less than two dollars and fifty cents per acre, nor shall any of said town lots be sold (except with the consent of the parties) below first cost, except the village lots in Constantine, which last mentioned lots are to be sold in the discretion of said Green, and the said parties of the first part agree to execute contracts of sale, on receiving the payment of one-fourth in cash as aforesaid, agreeably to the terms aforesaid; and the said parties of the first part further covenant and agree to account to, and pay over to said Green all sums of money, and transfer to him all securities, and convey to him all lands that may remain in their possession after they shall have received the sum of $12,310.60, with interest at seven per cent. per annum from the first day of January last, to be computed annually, together with all costs and expenses and taxes that may be incurred in the premises." In consideration of which, Green covenanted that he would, immediately after the said first day of October, execute and deliver to the complainants his bond and mortgage on certain property he owned in the village of Niles, for the said $12,310.60 and interest. The proceeds of the lands to be sold were to be applied on the bond and mortgage, when received by the complainants, and the bond and mortgage were to be paid within five years. Green did not sell the lands on October 1st, 1839, nor had he executed to the complainants his bond and mortgage.

The defendants demurred.

S. Barstow, in support of the demurrer.

J. F. Joy, contra.

[*59] *The Chancellor. Green insists that the sale of the lands on October 1st, 1839, was a condition precedent to the giving of the mortgage, and that, by the last contract, it was the duty of the complainants, and not of himself, to sell them. This is the only question, and the decision of the Court must depend on the construction to be given to the complainants' covenant in the contract of June 24th, 1839, that the lands purchased under the contract of 1835, should be exposed for sale, at public vendue, on the first of October then next.

Contracts are to be construed according to the intention of the parties, which is to be looked for in the contract itself. And, when several instruments, relating to the same matter, are made between the same parties at the same time, they form one entire contract, and are to be construed together. *Jackson* v. *McKenney*, 3 Wend. R., 233; 10 Pick. R., 302. So, where one writing refers to another, the intention of the parties is to be gathered from the two instruments taken together. Cow. & H. Notes, p. 1420, and cases there cited. On the same principle, when one contract grows out of another to which it refers, and both are in writing, the first contract may be looked into to get at the intention of the parties in the last, when that intention is not clearly expressed on the face of the contract itself.

By the contract of June 24th, 1839, the complainants covenanted that the lands purchased under the contract of November 5th, 1835, should be exposed for sale, at public vendue, on the first day of October then next. The covenant does not say in express terms that they shall be exposed for sale by the complainants. This is an inference merely, drawn from the fact that the complainants are the covenantors, and it would be conclusive, were it not inconsistent with other parts of the same contract, and with the previous contract of November,
[*60] 1835. That the *complainants were to sell the lands, instead of Green, is inconsistent with other parts of the con-

tract. The sale was to be at Niles, in Michigan, or at such other place as Green might elect in Illinois or Michigan. If Green was to sell them, it was proper that he should have the selection of the place of sale, more especially as they had been purchased by him, and he was better acquainted with their location, and the situation of the country, than the complainants. If the complainants were to sell them, the contract is deficient in not requiring Green to select the place of sale, and notify the complainants of it, a suitable length of time before the first of October, when the sale was to take place. Again, the contract, after stating the minimum price at which sales may be made, says the lands in Constantine may "be sold in the discretion of said Green." The only inference to be drawn from this is, that Green was to sell the lands. He might sell the Constantine lots at such prices as he thought proper, although he was restricted in the price of the other lands. The contract further provides that the complainants shall "execute contracts of sale, on receiving the payment of one-fourth in cash," &c. If complainants were to sell the lands, this was altogether unnecessary. It could not in any way affect their contracts with the purchasers at the sale. But, if the lands were to be sold by Green, as the title was in the complainants, it was a recognition of his agency and authority to sell, and an undertaking on the part of complainants to execute the contracts he might make. But all ambiguity as to the intention of the parties is removed, when we take the two contracts together. By the first contract, Green was to purchase the lands, to take the title in the name of complainants, to take the agency of them after they were purchased, and to sell them to the best advantage for complainants. But when *and how was he to sell them? That was left to be subsequently arranged between the parties. The contract provides that all questions which may arise relative to the management or disposition of the lands, or the manner of conducting the sales, whether for cash or credit, shall be determined by a majority in interest. Green was bound to sell them, when they were to be sold, but he could not sell them without the [*61]

consent, express or implied, of a majority in interest. This was given by the contract of June 24th, which fixes the time, manner and conditions of sale, and leaves the place of sale, under certain limitations, discretionary with Green. It is in this light I consider the covenant of the complainants, and it seems to me there can be no doubt on the question, when the two contracts are taken and construed together. I cannot think it was the intention of the parties to release Green from the obligation he was under to sell the lands.

It was said on the argument, that Green should have had a power of attorney from the complainants, to sell. That was not necessary. The two contracts gave him ample power for that purpose.

Demurrer overruled.

[*62] *John Freeman *v.* The President, Directors & Company of the Michigan State Bank.

A judgment creditor who comes into this Court for relief, must show that he has in good faith exhausted his remedy at law. This is usually done by showing an execution issued to the county where the debtor resides, returned unsatisfied in whole or in part.[1]

Where debtor had property in another county, which, before the return day of the first execution, he offered to complainant to be levied upon, *held*, the complainant should have caused his execution directed to the sheriff of the debtor's county to be returned, and sued out an *alias* execution into the county where the property was situated.

The execution to the debtor's county may, for this purpose, be returned at any time; and it is not necessary to wait until the return day.[1]

This was a judgment creditor's bill.

The judgment was obtained in the Circuit Court for the county of Wayne, and an execution directed to the sheriff of that county had been taken out and returned unsatisfied.

[1] See Smith *v.* Thompson, *ante*, 1.

The defendants put in a plea, stating that, when the sheriff called on them with the execution, they were, and still are, the owners in fee simple of certain unincumbered real estate, described in the plea, situated in the counties of Saginaw and Lapeer; that such real estate is sufficient to satisfy the judgment; that they caused the fact that they were owners of real estate in said counties, sufficient to satisfy the judgment, and standing in their name on the records of the registers of deeds for said counties, to be communicated to the plaintiff's attorneys, who had control of the judgment and execution, and whose names were indorsed on the writ; that they caused such facts to be communicated during the lifetime of the execution, *and that they also caused an offer to be made on [*63] their behalf, at the same time, to the said attorneys, to turn out the said lands, or any of them, to be levied on and sold under and by virtue of any execution or writ of *fieri facias* that might be issued on the judgment.

H. H. Emmons, for complainant.

J. F. Joy, for defendants.

The Chancellor. The law is too well settled to be now disturbed, that a judgment creditor, who comes into this Court for relief, must show he has in good faith exhausted his remedy at law. This is usually done by showing an execution, directed to the county where the debtor resides, returned unsatisfied in whole or in part. A man is supposed to have his property about him, and the means in his possession to pay a judgment obtained against him, when called on by the officer. This is the reason of the rule requiring the execution to be sent to the county in which the debtor resides. But it may turn out that he has neither the money to pay the judgment, nor property, in the county in which he resides, to be levied upon, and yet has, in another county, abundant property to pay the debt. Such is the case before me, with this additional fact, that the defendants informed the complainant they were the owners of real estate sufficient to pay the judgment, in Saginaw

and Lapeer counties, and offered to turn it out to be levied on and sold, if the complainant would send an *alias* execution into either of those counties. This is the substance of the plea. It cannot be said, under such circumstances, that the complainant has, in good faith, exhausted his remedy at law.

He should have had his execution returned, and taken
[*64] out an **alias*, directed to the sheriff of the proper county. It was not necessary to wait until the return day of the execution. It might, for that purpose, have been returned in vacation. Laws 1839, p. 23, § 6.

Plea allowed.

Presque Cote *v.* Henry P. Dequindre *et al.*

A debt due to two or more persons jointly, on the death of any of them, passes to the survivor or survivors, and not to the personal representatives of the deceased.[1]

The bill in this case was filed to foreclose a mortgage given by Louis Dequindre to Joseph Cote, Magdalene Cote, and the complainant, Presque Cote, to secure a debt of between ten and eleven hundred dollars. Joseph Cote and Magdalene Cote, two of the mortgagees, and Louis Dequindre, the mortgagor, were dead, and the surviving mortgagee, Presque Cote, filed his bill against Henry P. Dequindre and Anne Dequindre, heirs at law of Louis Dequindre, deceased, and four other persons claiming an interest in the mortgaged premises, as subsequent purchasers or incumbrancers. The last mentioned defendants demurred for want of equity, but, on the argument, assigned as a cause of demurrer, that the personal representatives of Joseph Cote and Magdalene Cote, were not made parties to the bill.

[1] See Teller *v.* Wetherell, 9 Mich., 464; Martin *v.* McReynolds, 6 Mich., 72.

J. S. Abbott, in support of demurrer.

A. W. Buel, contra.

*The Chancellor. On the death of Joseph Cote and [*65] Magdalene Cote, the debt at law survived to the complainant, who alone could sue for it, or discharge the mortgage on receiving payment. A debt due to two or more persons jointly, on the death of one or more of them, passes to the survivor or survivors, and not to the personal representatives of the deceased. The administrator or executor of the deceased party, it is true, in nearly all cases, has in equity an interest in the money when collected, but that is no concern of the debtors or mortgagor, who is bound to pay the survivor, in whom the legal interest is vested. The interest in the mortgage survives. R. S., 258, § 8, 9.

Demurrer overruled.

Justus Ingersoll *v.* Zebulon Kirby *et al.*

A complainant cannot demand several distinct things having no connection with each other, of several defendants, by the same bill.[1]

When the matter in litigation is *entire in itself*, it is not necessary that each defendant should have an interest in the suit co-extensive with the claim set up by the bill; he may have an interest in a part of the matter in litigation, instead of the whole.[2]

[1] See, generally, on the subject of multifariousness, Wales *v.* Newbould, 9 Mich., 45; Wheeler v. Clinton Canal Bank, Harr. Ch., 449; Page *v.* Webster, 8 Mich., 263; Kerr *v.* Lansing, 17 id., 34; Schofield *v.* Lansing, id., 437; Reed *v.* Wessel, 7 id., 139; Hammond *v.* Mich. State Bank, *post*, 214; Bristol *v.* Johnson, 34 Mich., 123.

[2] Where different parcels of land are claimed by two parties by different titles, they cannot be joined as defendants in a bill filed by a party claiming both parcels, to quiet his title. Hunton *v.* Platt, 11 Mich., 264. See, also, Burpee *v.* Smith, *post*, 327; Hart *v.* McKeen, *post*, 417.

This was a hearing on demurrer.

The bill states that complainant, in 1830, resided at Medina, in the State of New York, at which place he was extensively engaged in business as a tanner and currier, and dealer in leather, and that, at the solicitation of Zebulon Kirby, [*66] one of the defendants, he furnished him with *a stock of leather, worth from one thousand to fifteen hundred dollars, and two hundred dollars in money, to go to Detroit and open a store in the leather business for the complainant; that Zebulon went to Detroit, and opened the store in the summer of that year, and continued in charge of it as the agent of the complainant until September, 1831, during which time the complainant sent to him leather, and other articles to a large amount; that, in 1831, the complainant entered into copartnership with Rufus Ingersoll and John Bagley, who also resided at Medina, under the name and firm of Justus Ingersoll & Co.; that, by the copartnership agreement, the store at Detroit became the property of the firm, who continued the business under the charge of Zebulon, as their agent, and supplied the store from time to time with leather and other articles from Medina, until November, 1833, when Rufus Ingersoll and John Bagley sold out their interest in the Detroit store to the complainant; that at the same time, or soon after, a new copartnership in the business at Detroit was formed between the complainani and Zebulon, under the name of Ingersoll & Kirby, that the complainant was to be credited on the books of the new firm, as capital put in by him, with the whole amount of goods, property, debts and moneys, belonging to the concern at Detroit, and Zebulon with about $900, which was due to him for his services as agent of the firm of Justus Ingersoll & Co.; that Zebulon was to devote his whole time and attention to the business of the firm, that for all stock and materials the complainant should afterwards furnish, he was to receive credit on the copartnership books, as so much additional stock put in by him; and that complainant continued to reside at Medina, and to carry on his business there, until the month of September, 1838, when he removed with his family to Detroit, and,

*on the 28th day of August, 1839, dissolved the copart- [*67]
nership of Ingersoll & Kirby.

The bill further states, that when the complainant purchased the interest of his copartners in the Detroit store, Zebulon was requested to make out, and forward to Medina, a true and faithful inventory of the proprety, debts, &c., belonging to that branch of the copartnership business of Justus Ingersoll & Co.; that he agreed to do so, but never did; that the complainant should have been credited, on the books of Ingersoll & Kirby, with at least $26,841.52, as the amount of stock, debts, &c., belonging to the Detroit store, when the copartnership of Ingersoll & Kirby was formed, and that Zebulon had neglected to pass the same to the credit of the complainant. The bill also charges Zebulon with defrauding the complainant, and states that he did not keep correct accounts, that he neglected to keep a cash book, that he deposited the copartnership moneys in the bank in his own name, instead of the partnership name, and that he had used the money of the firm to pay his own individual debts, and the like. Among other charges of this description, the bill states he had invested certain sums of money belonging to the firm in real estate, which he claimed to hold as his individual property; and that, in the summer of 1838, George Kirby, the other defendant, who is a brother of Zebulon, came to Detroit from the State of New York on the invitation of Zebulon, for the purpose of getting up an establishment in the same line of business, the better to conceal the frauds Zebulon was practising on complainant; that George opened a store in Detroit, and commenced dealing as a leather merchant, on a stock of goods furnished him by Zebulon, in part from the store of Ingersoll & Kirby, and in part purchased with money belonging to the firm; that Zebulon, at different times, caused large quantities of *leather to be removed [*68]
from the store of the firm to George's store, without consulting complainant, and without his knowledge, and that such leather was received by George, and sold out of his store; that whatever goods have been received and sold by George, at his store in Detroit, were wholly or chiefly purchased

with the money of the firm of Ingersoll & Kirby, which had been received by Zebulon in the course of their business, and and never accounted for to complainant, that Zebulon was the real owner of the stock in George's store, or of the greater part of it, and that George had full notice and knowledge of all the facts, and was himself a party to the fraudulent intentions and conduct of Zebulon, so far as related to the use of the property and funds of Ingersoll & Kirby in his establishment; and that the conducting of the business in George's name was intended as a mere cover to defraud complainant.

The bill concluded with a prayer that an account might be taken of all and singular the dealings and transactions aforesaid, between the complainant and defendants respectively, from the commencement thereof, and also an account of all moneys received by said Zebulon, both while such agent and partner, &c.

George Kirby demurred for want of equity, and also for multifariousness, and put in an answer denying "all combination and confederacy charged in the bill."

A. D. Fraser, for complainant.

D. Goodwin, for defendants.

The Chancellor. The answer of the defendant denies nothing except the general charge of combination and confederacy. The other parts of the bill, therefore, must be [*69] taken to be true. The answer does not deny that *George Kirby was furnished, by his brother Zebulon, with a stock of goods to commence business on in Detroit, and that the goods were, in part, taken from the store of Ingersoll and Kirby, and in part purchased with the money of the firm; or that Zebulon, at different times, caused large quantities of leather to be taken from the partnership store to George's store, to be sold, or that these things were done without the knowledge or consent of complainant, and for the purpose of defrauding him. Nor does it deny that Zebulon is the real owner of the goods in George's store. These allegations of the bill, and

others, such as George's knowledge of the nature of the several transactions, and that the store was carried on in his name as a cover to the frauds of his brother, in which George participated, are all admitted by the demurrer. A stronger case of fraud could not well be made out.

The other ground of the demurrer is, that the bill is multifarious. A complainant cannot demand several distinct things, having no connection with each other, of several defendants, by the same bill. But, when the matter in litigation is entire in itself, and does not consist of separate things having no connection with one another, it is not necessary that each defendant should have an interest in the suit co-extensive with the claim set up by the bill; he may have an interest in a part of the matter in litigation, instead of the whole. *Fellows* v. *Fellows*, 4 Cow. R. 682; *Brinkerhoof* v. *Brown*, 6 J. C. R. 139; The opinion of the Vice-Chancellor in *Salvidge* v. *Hyde*, 5 Madd. R. 138.

The object of the bill is a discovery of the copartnership effects of Ingersoll and Kirby, and an account and settlement of the copartnership business between the partners. This is one entire matter, and George Kirby is made a party on the ground of fraud. He is charged with aiding and assisting Zebulon to defraud the complainant, *and, for that [*70] end, with having received and sold as his own, and with having in his possession, and claiming as his own, but in fact for Zebulon, certain property of the firm of Ingersoll & Kirby. The complainant is entitled to his proportion of this property, as well as the other property of the copartnership; and, charged as George is with fraudulently obtaining it through Zebulon,and holding it for him, the bill is not multifarious because it prays an account of other copartnership property, with which George has had nothing to do, and is in no way connected.

In *Fellows* v. *Fellows*, the appellant, and two others impleaded with him, held separate parts of the property in litigation, under different deeds made to them at different times

by John Fellows, who was also a party, to defraud the respondents; and the bill was held to be not multifarious.

The decision of the Vice Chancellor in *Saltridge* v. *Hyde*, was reversed by the Lord Chancellor, who allowed the demurrer for multifariousness. 1 Jac. R. 151. (S. C. 4 Eng. Cond. Ch. R. 68.) But that case differs materially from the one now before the Court. The bill did not charge that the conveyance from Culliford, the executor and trustee, to Laying, who demurred, was made to defraud the complainants. The report of the case in Maddock, does not show it to have been a case of actual fraud, on the part of Culliford and Laying; and, on the argument before the Lord Chancellor, as appears by the report in 1st Jacob's R., it was contended only, that the defendant Laying had entered into the contract under circumstances amounting, according to the case made by the bill, to a fraud. The Lord Chancellor, in his opinion, says, "If an executor, having a power to sell, agrees to sell to A. B., can a bill be filed against him, and also for a general administration [*71] of the estate? He may have made infinitely *too good a bargain with the trustee to sell, one that the Court would not allow to stand, but that is no ground for making him a party to the general administration." Such language would not have been appropriate, if the case had been one of actual fraud.

The bill prays an account against Zebulon of all moneys, etc., received by him as agent of the firm of Justus Ingersoll & Co. This, at first view, would seem to be a separate and distinct matter from the copartnership business of Ingersoll & Kirby, and to have no connection with it. Such would, undoubtedly, be the case, were it not for the agreement between complainant and Zebulon, when they entered into copartnership, that complainant should be credited with the amount of stock, debts, etc., belonging to the Detroit store, as capital put in the store by him. It is this agreement that forms the connecting link between the two. A settlement of the copartnership business cannot be made between the partners, without ascertaining the amount of capital put in by each; and, to do this, an account

must be taken of the stock belonging to the Detroit store, at the time when it was merged in the firm of Ingersoll & Kirby. The agency and copartnership business are so blended together as to make it necessary to unite them in the bill. Both accounts must be taken, under the peculiar circumstances, to settle the copartnership business; and, such being the case, the bill on that account is not multifarious. *Lewis* v. *Edmund*, 6 Sim. R., 251; (S. C. 9 Eng. Cond. Ch. R., 255.)

Demurrer overruled.

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*Silas S. Hart *v.* Elijah Lindsay. [*72]

After a decree has been entered on a bill regularly taken as confessed, the question of opening it, to let in a defense on the merits, should be brought before the Court by petition, accompanied by the answer proposed to be put in.

A decree regularly entered will not be opened, except under special circumstances, and a stronger case must be made for this, than to vacate an order *pro confesso* before decree.[1]

Where a party defendant has been guilty of gross negligence, a decree will not be opened, neither will a re-taxation of costs be ordered, or sale be set aside.

Rule for computing costs and commissions on mortgage sales laid down.

Motion to open a decree on bill taken as confessed, for a re-taxation of costs, and to set aside the Master's sale of mortgaged premises.

The bill was filed June 21st, 1839, and the subpœna personally served on the defendant, on the 27th day of the same month.

The defendant stated in his affidavit, on which this motion was founded, that, soon after the commencement of the suit, he went to the city of Detroit, and employed, as he supposed,

[1] See Russell *v.* Waite, *ante*, 31, and note.

Messrs. Witherell & Buel to attend to it for him, to whom he paid some money, and promised to send more; that he afterwards sent them more money, by a young man who, as he was informed, did not pay it to them; that he heard nothing further of the matter until August, 1841, when he learned the complainant had obtained a final decree in the cause; that he then called on the complainant, and agreed with him for a stay of all further proceedings for one year, on his paying him $30 for the extension, and all costs that had accrued, which he did. [*73] That the consideration of the mortgage was $200, *in what were commonly called Wildcat bank bills, mostly on the banks of Genesee and Lapeer; that he had but little acquaintance with, or knowledge of the value of bank bills of any kind, at the time, and received them solely on the representation of Truesdail, the mortgagee, who assured him they were current, and good money; that, on the next day, he was informed, by persons who were good judges of money, that the bills were worth little or nothing; and that he had not realized over $50 from them.

The complainant, in his affidavit, stated he was the *bona fide* holder of the mortgage; that he purchased it of Truesdail, and paid for it the full amount of the mortgage and interest; that, previous to his purchasing it, he told the defendant of his intention, when the defendant informed him it was a good, valid, and in all respects a fair mortgage, and would be paid by him; that, shortly after he commenced foreclosing it, defendant, for the first time, told him it was given for Wildcat money, which he had used, with the exception of forty or forty-five dollars; and he then proposed to pay $150, in a few days, if complainant would wait for the balance from six to nine months; that defendant afterwards had frequent interviews with complainant, and from time to time gave him assurances he would pay the money; that, July 7th, 1841, the defendant paid the solicitor's and register's fees, and, soon thereafter, again told complainant the money should be paid, and wished to know what kind of money complainant would take; that, about the last of August, or first of September following, he said he could not

raise the money, and wished complainant to wait until the first of June, 1842; to which complainant stated he should have to go or send to Detroit to consult counsel as to whether he could do so without prejudicing his rights, and if he could, and defendant would pay all the costs in the case, and *$30 [*74] for his trouble and expenses in going to Detroit to consult counsel, he would wait until that time. After counsel had been consulted, the agreement was concluded, and the $30 and Master's costs were paid, and the complainant was to be at liberty, if the mortgage debt was not paid, to advertise the premises before the first of June, to be sold after that day. The premises were sold by the Master, and bid in by the complainant on June 13th, 1842. The affidavit of True P. Tucker confirmed the statement of the complainant as to the agreement to postpone the payment to the first of June, the payment of the $30, and the right to advertise the premises before the first of June, to be sold after that time.

H. H. Emmons, in support of the motion.

H. T. Backus, contra.

The Chancellor. After a decree has been entered on a bill regularly taken as confessed, the question of opening it to let in a defense on the merits, should be brought before the Court by petition In *Wooster* v. *Woodhull*, 1 J. C. R., 541; *Parker* v. *Grant*, id., 630; *Lansing* v. *McPherson*, 3 J. C. R., 424, and *Russell* v. *Waite*, *ante*, 31, the application was by petition. And the answer the defendant proposes to put in should accompany the petition, that the Court may see its materiality, and that it is a full and sufficient answer. A decree regularly entered will not be opened, unless under special circumstances. A stronger case must be made out than is ordinarily required to vacate an order for taking the bill as confessed, before a decree has been entered upon it. This may be done on motion or petition. But, to enable the Court to judge of the merits of the application, the defendant must set forth the nature

[*75] ture of his defense, in the affidavit or petition, *or produce the sworn answer he proposes to file in the case. *Stockton* v. *Williams*, 1 Har. Ch. R., 241.

The defendant has not satisfactorily accounted for his delay in not making his application sooner. From his own statement he appears to have been guilty of gross negligence. The bill was filed June 21st, 1839, the subpœna served the same month, and the decree entered September 12th, 1840. Soon after the subpœna was served, he swears he employed, as he supposed, Messrs. Witherell & Buel to attend to the suit for him, and that he heard nothing more of it until August, 1841, —two years and more,—when he learned the complainant had obtained a decree against him. During this time he makes no inquiries of his solicitors as to the progress of the suit, nor does he so much as call on them, or give himself any trouble whatever about it. When he is informed a decree has been taken against him by default, what does he do? He does not go to his solicitors to learn the cause, but applies to complainant to give him until the following June to pay the money, and enters into an agreement for that purpose. He then waits until the time has expired, or is about to expire, before he makes his application to this Court. To open the decree under such circumstances, would be establishing a most dangerous precedent. The agreement for further time is, of itself, a sufficient reason why this part of the defendant's motion should be denied.

The costs were taxed September 14th, 1840. The reasons stated for refusing to open the decree apply to a re-taxation of the costs. They are a part of the decree and were paid in part, under the agreement of the parties. In *Morris* v. *Morris*, 1 J. C. R. 44, the Court refused to order a re-taxation of costs after two terms had intervened, on the ground the application came too late. In the present case, nearly two years

[*76] have elapsed since the costs *were taxed, and a year since they were paid by the defendant. In *Stockholm* v. *Robbins*, 24 Wend. R. 109, and the cases there cited, the question of costs was between attorney and client, and not between the par-

ties to the suit. The Master should not have taxed the costs without the affidavit required by the ninety-third rule of the Court, but it is too late now to object to the irregularity.

The costs of selling the mortgaged premises were taxed by the Master at $42.34. Of this amount, $20 were for printing the notice of sale, and $22.34 Master's fees. The sale was adjourned five several times, at the request of complainant, and on account of the illness of the Master. The expense of adjournments should not be borne by the defendant, unless made at his request. The Master charges a commission of $10. I think this too high. Commissions on mortgage sales should be one per cent on the first $500, and one-half of one per cent on the balance, the whole commissions in no case to exceed $10. Most of the other items were charged in the bill of costs taxed in September, 1840, and had been paid by the defendant, who should not have been charged with them a second time. The defendant may have an order for the re-taxation of these costs, and, on ascertaining the amount overpaid, a further order requiring complainant to repay the same to defendant, with the $35 balance of the purchase money still in his hands, with interest on both sums from the day of sale, and, on the same being paid to the defendant, or to the Register of this Court for him, the Master's report of sale to stand confirmed.

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*Nathaniel Weed *et al. v.* James Lyon *et al.* [*77]

The right of appeal is a statutory right, and, where a party has failed to comply with the provisions of the statute, within the time prescribed, the Court will not allow a re-entry of the decree to enable him to appeal.[1]

Motion to re-enter a decree, to enable the complainants to appeal to the Supreme Court.

[1] See Canfield *v.* Brig City of Erie, 21 Mich., 160; Elliott *v.* Dudley, 8 id., 62; Moore *v.* Ellis, 18 id., 77.

A decree was entered March 18th, dismissing the complainants' bill with costs. At the same time, notice was given of an appeal, and, April 25th, application was made to the Chancellor to fix the amount of the appeal bond, which was ordered to be in the sum of $100. On the 28th day of the same month, a bond was prepared and executed, and handed by the complainants' solicitor to his clerk, with instructions to have it approved and filed; but, owing to the negligence of the clerk, it was not filed with the Register within the ninety days required by the statute.

G. C Bates, in support of the motion.

H. N. Walker, contra.

The Chancellor. The statute regulating appeals from this Court, says: "Such appeal shall be claimed and entered within ninety days from the time of the making of such decree, or final order, and the appellant shall, within the said ninety days, file a bond to the appellee, with sufficient sureties to be approved by the Chancellor," &c. R. S. 379, § 122. The next section is in these words: "If the appeal shall not be entered and such bond be filed within the time above limited, no appeal shall be allowed."

[*78] *It was conceded on the argument, that the Court has no power to enlarge the time given by the statute for appealing; but it was insisted it has power to permit a re-entry of the decree dismissing the bill, and, in that way, to restore to the complainants what they have lost. The Court may, undoubtedly, allow a decree to be re-entered, on a proper case being made out for that purpose; but it cannot for the purpose of evading or getting round the statute, which is positive, that the appeal shall be claimed and entered, and the bond filed, within ninety days from the making of the decree. The exercise of such a power would, in effect, be claiming for the Court a power to do indirectly what it cannot do directly; nay, more, —a power to resuscitate a lost right, or to reinstate the complainants in what they have lost by their omission to comply

with the statute, and not through any fraud or improper conduct of the defendants.

The right of appeal from this Court to the Supreme Court, is a statutory right, given to either party who may be dissatisfied with the decision, on certain conditions, which can no more be dispensed with by a court of equity, than by a court of law, where the right has been lost by an omission to comply with the statute. It is the complainants' misfortune that the appeal bond was not filed within the ninety days; but it is not in the power of the Court, under the circumstances of the case, to give relief. See 2 Paige R. 413; 7 id. 245.

Motion denied.

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*Miles V. Rood *v.* Mirza Chapin & Merrick S. Chapin. [*79]

Where a party sold land for which other land was given in part payment, and was deceived in regard to the latter, the bargain was set aside and a reconveyance decreed.

Where a party purchases land in possession of a third person, with a knowledge of that fact, he takes it subject to all equities existing between his vendor and the person in possession.[1]

The bill in this case was filed to set aside a conveyance of real estate for fraud. It states, that the complainant, on the 28th of August, 1840, conveyed to Mirza Chapin, one of the defendants, forty acres of land situate in Genesee county, in consideration of a yoke of oxen, a cow, and forty acres of land situate in Wayne county. That complainant was induced to make the trade by the false and fraudulent representations of

[1] See Godfroy *v.* Disbrow, *post*, 260; Disbrow *v.* Jones, Harr. ch. 48; Norris *v.* Showerman, 2 Doug., 16; McKee *v.* Wilcox, 11 Mich., 358; Woodward *v.* Clark, 15 id., 104; Dawson *v.* The Danbury Bank, 15 id., 489; Bloomer *v.* Henderson, 8 id., 395; Hubbard *v.* Smith, 2 id., 207.

the defendant, who stated the land in Wayne county to be as good as any in the state, with openings of hazel brush upon a part of it, and in part covered with walnut, and white and black oak timber; that it was high land, free from marsh or swamp, and lay upon the corner of two roads that crossed each other, and was within a mile of a canal; all of which representations were untrue. That complainant, not having seen the land at the time of the trade, relied on the aforesaid representations of defendant, and that he afterwards, on discovering the fraud and imposition, on October 21st, 1840, notified defendant in writing that he did not consider the trade binding, and offered to rescind it, and to restore the oxen and cow, and reconvey the lot in Wayne county to the defendant; and demanded a reconveyance from him of the land in
[*80] Genesee county, which *the defendant refused to give. That defendant, on the next day, (October 22d, 1840,) conveyed the lot in Genesee county to his brother, Merrick S. Chapin, the other defendant, who, on the next day thereafter, served a written notice on complainant to quit the premises. The bill charged the conveyance from Mirza to Merrick was made without consideration, and to defraud the complainant.

Mirza Chapin, by his answer, admitted the trade, but denied that he held out any improper or false inducements to complainant, or misrepresented the land, as charged in the bill. The answer further states that defendant, before the exchange took place, informed complainant that he had then but recently purchased the lot of one George Brickford, who informed him it lay near the lands of Mr. Kellogg, of Brownstown, in Wayne county; that it lay on the corners by Kellogg's, and was good land, and had little or no marsh on it. That, if it was the land defendant supposed it to be from the aforesaid description, he had seen it, and it was good land; but, as it was some years since he had been near where it was described to be, he could not tell whether the roads were laid out or not; that he gave the complainant a description of the country, and of the timber growing there at the time of defendant's residence in that county, and stated that, if the land was where it was described

to be, the timber was oak, and that there was probably some walnut; and that he did not make any statements on his own positive knowledge of the value and situation of the land, but solely on the information he had received from Brickford, and that he did not make such statements, or any of them, with a view to mislead the complainant, or impose on him, but to give him all the information on the subject defendant had himself received; and he advised complainant to go and examine the lot for himself, and offered to go and show it to *him. He admitted he had been informed the lot did [*81] not lie on the roads where he supposed it did from Brickford's description; and that complainant had given him notice he did not consider the trade binding, and had offered to reconvey and return the property as stated in the bill. He also admitted that on the next day after he received the notice, he conveyed the lot lying in Genesee county to his brother, Merrick S. Chapin, but denied that such conveyance was made to defraud complainant, or without a good and valuable consideration.

Merrick S. Chapin, by his answer, denied all knowledge of the nature of the transaction between his brother and complainant, and all information on the subject, until after he had purchased and paid for the land. Admits the purchase on October 22d, 1840, and that, on the next day, he gave the complainant notice to quit the premises; but denies that the conveyance to him was made to defraud the complainant, or to assist his brother in defrauding him, or that it was made without a good and valuable consideration.

It is unnecessary to state the testimony, as the material parts of it are to be found in the opinion of the Court.

J. P. Richardson, for complainant.

Hunt & Watson, for defendants.

The Chancellor. There can be no doubt that Mirza Chapin fraudulently misrepresented the lot in Wayne county,

at the time of the trade, and his answer is but a lame attempt to plaster over and conceal the fraud. He says the representations made by him were stated, at the time, to be on the information of Brickford, of whom he had a short time before purchased the land, and that he advised complainant to go [*82] and see the land, before the *trade took place, and prepared to go and show it to him. If any such advice was given, or offer made, I have no doubt it was done with a view to throw complainant off his guard, and induce him to place greater reliance on the fraudulent representations of the defendant. The testimony shows that defendant's representations were of an entirely different character from what he states them to have been.

Ziba Goff, who was called on to draw the writings, says, he understood Rood had never seen the land in Brownstown. Chapin said the land was something like that they were on, which was hazel brush land, and what would be called rather hard, but middling good wheat land. Chapin said he would pay ten dollars an acre for every acre of marsh on it, and that it was as good land as that they stood on, which was the land Rood sold to Chapin, the principal part of which was good tillable land. He thinks Chapin said it was on four corners, and that there was oak, and some black walnut on it. He called it oak openings.

George Goff testifies that Chapin said it was a good lot of land, located upon a turnpike on one side, and on the other side had a road, running the length of it, as much traveled as the Shiawassee road running to Byron. He said it was timbered with oak and black walnut, with hazel nut plains—no marsh upon it. He said it was near to the route of a canal. He told Mr. Rood he could depend upon its being such land as he represented. Witness thinks he said he had been on the sides of the land. Witness understood Mr. Rood had not been on the land or seen it, and depended on Chapin's representations of it. Is positive Chapin said he had been on two sides of it. He said the man who had owned it had been offered

ten *dollars an acre for it, and it would bring that any [*83] time land would sell.

William R. Knapp states that Rood inquired of Chapin about the timber and the quality of the land, and what was its situation, and whether there was a road near it, and Chapin said it was one of four corners of the public highway, &c. That the land was a black sandy soil, a part well timbered, and a part openings; the timber was black walnut, hickory, and white oak. In reply to Mr. Rood's question, "Is there any marsh upon it?" Chapin said he had crossed two sides, and there was not any marsh upon it; that it was as good land as that on which we stood (which, in witness's opinion, was good land), or as good as any land in Michigan.

From the deposition of Henry Park, United States deputy surveyor, who surveyed the lot, and made a diagram of it, which accompanies his deposition, it appears to be almost entirely marsh, and low wet land, covered with willow and alder, with some few sand ridges. Mr. Park says it is not worth over twenty-five dollars, and that, taking it as a whole, it is not susceptible of being in any way cultivated as a farm, and that no part of it affords an eligible site for building. That the dry land is of the poorest quality, and that there is no timber except a few scattering oaks. The nearest road lies from thirty to thirty-six rods from it, and has the appearance of being a road chiefly for the accommodation of the immediate settlers.

It does not appear from the testimony the representations of Mirza Chapin were based on information received from Brickford, or any one else, but the contrary; for he said he had been on two sides of the lot, that he would give ten dollars an acre for the marsh on it, that it was as good land as any in Michigan, and that the former owner *(meaning Brick- [*84] ford) had been offered ten dollars an acre for it. The trade must, therefore, be set aside as fraudulent, and a reconveyance of the land be decreed, unless Merrick S. Chapin, the other defendant, is entitled to the protection of the Court, as a *bona fide* purchaser without notice of the fraud.

The complainant was in possession of the premises, claiming

them as his own, and insisting the trade between him and Mirza was not binding, in consequence of the fraud, when Merrick purchased of his brother, with full knowledge of complainant's possession.

On the 21st of October, complainant notified Mirza he did not consider the trade binding, and, on the next day, Mirza conveyed the land to Merrick, who, on the following day, gave notice to complainant to quit the premises. The quick succession in which these acts followed each other, is, of itself, calculated to excite suspicion in the mind. But the fact that Merrick knew, when he purchased of his brother, that the complainant was in possession of the premises, makes him a purchaser with notice of complainant's title.

A vendee who purchases real estate not at the time in the actual possession of the vendor, but of a third person, with a knowledge of that fact, takes it subject to all equities existing between the vendor and the person in possession, whether such person be in possession as tenant of the vendor, or otherwise. This is the principle to be deduced from the cases of *Taylor* v. *Stibbert*, 2 Ves. R., 437; *Daniels* v. *Davison*, 16 Ves. R., 249, and *Grimstone* v. *Carter*, 3 Paige R., 421.

Decree for complainant.

[*85] *Benjamin Mercer *v.* Gurdon Williams *et al.*

The Legislative Council of the Territory of Michigan had power to pass acts of incorporation, which were valid until disapproved by Congress.[1]

Where a railroad company had, in good faith, obtained an assessment of damages by a jury, on land which was necessary for their road, long before they wanted the use of it, and afterwards, when any delay would have been injurious to them, and while the confirmation of the inquisition was still pending in the Supreme Court, to which it had been reserved, had tendered the damages assessed, and proceeded to use the land, the

[1] See Swan *v.* Williams, 2 Mich., 427.

Court, under the circumstances, refused to enjoin them from constructing the road upon it, although the inquisition was not valid until confirmed; inasmuch as they could only be delayed, and could not be prevented from finally obtaining the land.[1]

This was an application for an injunction to restrain the defendants from constructing the Detroit and Pontiac railroad across the land of the complainant.

The company was incorporated by the Legislative Council of the Territory of Michigan, March 7th, 1834; and the road, as located, passed over two out-lots in the village of Pontiac, belonging to complainant. In 1839, the company, not being able to agree with the complainant for the right of way, had his damages assessed by a jury, under the twelfth section of their charter, and the inquisition returned to the clerk of the Circuit Court for the county of Oakland, for confirmation. The complainant opposed the confirmation of the inquisition by the Circuit Court, which reserved the question for the opinion of the Supreme Court, where the question was still pending. On November 16th, 1842, the defendants entered on the aforesaid lots of the complainant, with ploughs, and other implements for the construction of the road, and commenced digging and removing the earth, the company having previously* tendered the complainant thirty dollars in silver, that [*86] being the amount at which the jury has assessed his damages.

G. W. Wisner, for complainant.

O. D. Richardson, for defendants.

The Chancellor. The injunction is asked on two grounds: *First*, that the Legislative Council of the Territory had not power to create a corporation; and, *Secondly*, that the company have no right, under their charter, to enter on the land, for the purpose of constructing their road, until they have procured a confirmation of the inquisition.

[1] See Bagg *v.* City of Detroit, 5 Mich., 348.

By the ordinance of 1787, for the government of the territory of the United States northwest of the river Ohio, the legislative power of the territory was vested in the Governor and Judges, until there should be five thousand free male inhabitants of full age in the district, when there was to be a general assembly or legislature, to consist of the governor, legislative council, and a house of representatives. The governor and judges, or a majority of them, were authorized to adopt and publish such laws of the original States, criminal and civil, as might be necessary, and best suited to the circumstances of the district, and report them to Congress from time to time; which laws were to be in force until the organization of the general assembly, unless disapproved of by Congress. Under this part of the ordinance it has been held by the Supreme Court of the State of New York, that the governor and judges had power to incorporate a bank. *Bank of Michigan* v. *Williams*, 5 Wend. R., 478. And this decision of the Supreme Court was afterwards affirmed by the Court of Errors of that State. 7 Wend. R., 539.

[*87] *The power of the general assembly, or legislature of the territory, was intended to be more extensive than that of the governor and judges, who were limited to the adoption of laws from the original States, while the ordinance declares "the governor, legislative council, and house of representatives shall have authority to make laws, *in all cases*, for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared." Now, there is nothing in the ordinance denying to the general assembly the right to charter a bank, railroad, or other corporation; nor is there anything in the exercise of such right repugnant to the principles or articles contained in it. It would, moreover, it seems to me, be a strange construction of the ordinance, to concede to the governor and judges, the first and lower grade of territorial government, a power denied to the last and higher grade.

The ordinance has been repeatedly altered by Congress. The general assembly mentioned in it, was never organized in Mich-

igan. By "an act to amend the ordinance and acts of Congress for the government of the Territory of Michigan, and for other purposes," approved March 3, 1803, the same powers which were granted to the governor, legislative council, and house of representatives, by the ordinance, were conferred on the governor and legislative council mentioned in that act, which also provided that no law passed by the governor and legislative council should be valid, after it had been disapproved by Congress. This was the only limitation on the governor and legislative council, in addition to that contained in the ordinance, that they should pass no law repugnant to the principles and articles in the ordinance established and declared. By another act, approved on the 5th of February, 1825, Congress increased the number of the legislative *council, and afterwards, on the 29th of January, 1827, authorized the members of the council to be elected by the people; but by neither of these acts, nor any other relating to the territory, did they impose any other or further restrictions on the powers of the legislative council; nor has Congress ever disapproved of the act incorporating the Detroit and Pontiac Railroad Company. [*88]

Second. Under the eleventh and twelfth sections of the act of incorporation, the company have no right to enter on complainant's land, for the purpose of constructing their road, until they have procured a confirmation of the inquisition, and made a tender of the damages. The eleventh section vests them with all the privileges, rights, and powers, necessary for the location, construction, and keeping in repair said road; but, while it prescribes no limitation to their right to enter on lands for the purpose of locating the road, it says they may enter upon, use and excavate, any land which may be wanted for the site of said railroad, &c., so soon as the amount of damages is ascertained, and tendered, as thereinafter provided. And the twelfth section provides that, where the parties cannot agree, the damages shall be assessed by a jury, who shall reduce their inquisition to writing, and that it shall then be confirmed by the Circuit Court of the county, if no sufficient cause to the contrary is shown;

or, if set aside, the Court may direct another inquisition, and that such valuation, when paid or tendered to the owner, shall entitle the company to the land required, as fully as if it had been conveyed by the owner; and concludes with a proviso, that the company shall not have power to take the land of any person for the purposes of the corporation, until full payment shall have been made or tendered to such person, for all damages assessed to him, together with the costs of such inquisi-
[*89] tion or assessment. This *language is too clear and explicit to be misunderstood. The damages must not only be assessed, but the inquisition must be confirmed, before the company can obtain a right to the land by a tender.

The only remaining question is, whether an injunction should be granted under the peculiar circumstances of the case. If the Court had power to restrain the company from taking the land at all, under their charter, I would allow the injunction. But this it cannot do. The effect of the injunction would be only to arrest the construction of the road, until the company obtained a right to the land, in the manner pointed out in their charter. Even this the Court would do in an ordinary case; but there are circumstances in the present case, which, I think, take it out of the general rule, and I shall, accordingly, deny the injunction, on the ground that the company had, in good faith, instituted proceedings under their charter to take the land, long before they were in want of it for the construction of their road; that the jury assessed the complainant's damages at thirty dollars only, and that that amount had been tendered to him, and the company will sustain great damage from the delay of their work.

Injunction denied.

*The Attorney General *v.* The President, Directors and Company of the Oakland County Bank. [*90]

The general rule is, that an injunction will be dissolved where the equity of the bill is met, and fully and clearly denied by answer; which must, however, for this purpose, be positive, and full and satisfactory to the Court.[1]

The granting and continuing of injunctions rest in the discretion of the Court, and there are exceptions to the rule above stated.

If, by a dissolution of the injunction, the complainant is likely to be deprived of all benefits he might otherwise derive by succeeding in the suit, it will not be dissolved as a matter of course, on the coming in of the answer denying the equity of the bill.

An injunction will not be dissolved on an answer admitting the equity of the bill, and setting up new matter as a defense.

Where a bill is filed under a statute, where there is an exception in the enacting clause, it must negative the exception; but, where there is no exception to the enacting clause, but an exemption in a proviso thereto, or in a subsequent section of the act, it is matter of defense, and must be shown by the defendant.[2]

The defense in such case should state facts, and not conclusions of law.

Where the answer is put in issue, the defendant must prove what he insists on by way of avoidance.

Corporations have such powers and capacities as are given to them, and none other; and every abuse of such powers is a violation of the law of their being, and a forfeiture of their franchises. The establishment of an agency or office at a place not authorized by the charter, was held to be a violation of it.[3]

Under the act of June 21, 1837, this Court has jurisdiction over banking corporations to restrain them by injunction from exercising their corporate powers, to appoint a receiver to take charge of their assets, and to decree

[1] See Eldred *v.* Camp, Harr. Ch., 162, denial by plea.

[2] See Myers *v.* Carr, 12 Mich., 63; Lynch *v.* The People, 16 id., 472; Great Western R. R. Co. *v.* Hanks, 36 Ill., 281; Chicago, B. & Q. R. R. Co. *v.* Carter, 20 id., 390.

[3] See People *v.* Oakland County Bank, 1 Doug., 282; Orr v. Lacey, 2 id., 230; People *v.* River Raisin & Lake Erie R. R. Co., 12 Mich., 389; Underwood *v.* Waldron, id., 73.

their dissolution, in the following cases: 1st. When the corporation is insolvent. 2d. When it refuses to pay its debts. 3d. When it has violated any provision of its charter, or of any law binding on it.

Motion to dissolve injunction.

This was a bill filed by the Attorney General, under the act of June 21st, 1837, entitled "An act to provide for [*91] *proceedings in chancery against corporations, and for other purposes." It prayed for the appointment of a receiver, under the fifth section of the act, and that the bank might be dissolved, and be forever deprived of its corporate rights, powers, privileges and franchises; and for such further or other order, as should seem meet, and should be agreeable to equity. Among other things, the bill stated that, by the twenty-third section of the act incorporating the bank, which act was approved March 28th, 1836, it was provided that the legislature might, by a vote of two-thirds of each house, amend, alter or repeal the same; and that, by an act of the legislature, approved February 16th, 1842, the said act of incorporation was repealed, by a vote of more than two-thirds of both houses of the legislature, and complainant was informed and believed that the bank had not complied with the saving condition contained in the second section of the repealing act. The bill further stated, that the bank had established an agency at Detroit; and charged that the establishment of such agency was a violation of its charter.

An injunction was granted against the bank, which put in its answer, verified by the oath of its president and cashier, and moved a dissolution of the injunction. The answer admitted the act of incorporation, and the act of February 16th, 1842. It then stated that the bank had complied with the condition contained in the second section of the repealing act. It also admitted the bank had an agency at Detroit, where its cashier resided, and where a large part of its funds was kept; but stated that the agency was confined solely to the redemption of the issues of the bank, and to the buying and selling of exchange, as incident to and connected with the redemption

of its issues; and that no discounts had been made at the agency.

*It is unnecessary to make any further statement of [*92] the facts contained in the bill and answer, as they appear, so far as they have any bearing upon the decision of the Court, in the opinion of the Chancellor.

T. Romeyn, *E. Farnsworth*, *and E. B. Harrington*, in support of the motion.

Z. Platt, *Attorney-General*, contra.

The Chancellor. It appears very clearly to my mind that the present motion ought to be denied. But, as the counsel for the bank pressed their motion with much zeal, and seemed to think the question too clear to admit of a doubt, I shall state my reasons for refusing to dissolve the injunction, more fully than I otherwise should.

First. When an injunction will be dissolved on bill and answer.

The general rule is, to dissolve an injunction when the equity of the bill is met, and fully and clearly denied by the answer. The answer, however, must be positive, and not upon information and belief, and must be full and satisfactory to the Court; otherwise, the injunction will not be dissolved, but will be retained until the final hearing of the cause. *Roberts* v. *Anderson*, 2 J. C. R., 202; *Ward* v. *Van Bokkelen*, 1 Paige R., 100. The granting and continuing of injunctions rest in the discretion of the Court, and there are exceptions to the general rule above stated. *Poor* v. *Carleton*, 3 Sumn. R., 70. If there would be very great danger of the complainant's losing all the benefits of his suit, by a dissolution of the injunction, should he finally succeed, the Court will not as a matter of course dissolve it, on the coming in of the answer denying the equity of the bill. Nor will an injunction be dissolved on the answer of the defendant, where the answer admits the equity of the bill, *and sets up new matter as a defense. *Minturn* [*93] v. *Seymour*, 4 J. C. R., 497.

Second. Is the equity of that part of the bill which relates to the repeal of the charter, met and denied by the answer? The defendants admit the repeal of their charter, but say they have complied with the second section of the repealing act. This, they contend, is a full and complete denial of the equity of this part of the bill. The argument is this: That, inasmuch as the bill does not state by the omission of what particular acts, the defendants have not complied with the second section of the repealing act, but states generally that they have not complied with it, their answer need not go any further than the bill, and that, therefore, it was not necessary for them to state how, or in what way they had complied; that it was sufficient for them to affirm a compliance generally, and, having done so, the injunction ought to be dissolved. The error or fallacy of this mode of reasoning lies in mistaking the equity of this part of the bill, or in supposing it to consist in the omission of the bank to comply with the second section of the repealing act, instead of the repeal of its charter.

By the first section of the act of 1842, the charters of some dozen banks are unconditionally repealed, and, among the number, is the Oakland County Bank. Then follows the second section, which is in these words: "The said Banks of Macomb, Pontiac, Oakland County, Calhoun, and Constantine, if they shall hereafter comply with the requirements of the act, entitled 'an act to repeal the suspension act passed April 12, 1841, and for other purposes,' and shall continue to do a legitimate banking business, shall be exempt from the provisions of this act." Now, at law, in declaring on a statute, where there is an exception in the enacting clause, the pleader must [*94] *negative the exception; but, where there is no exception in the enacting clause, but an exemption in a proviso to the enacting clause, or in a subsequent section of the act, it is matter of defense, and must be shown by the defendant. *Teel* v. *Fonda*, 4 J. R., 304; 3 J. R., 438; 1 J. R., 513. Such, I take it, is the rule of pleading in this Court, when a bill is filed under a statute.

It was not necessary, then, for the Attorney General to state

in the bill, as he has done, that the bank had not complied with the second section of the repealing act. It was sufficient for him to state the repeal of the charter, and leave it for the defendants to show a compliance with the second section of the act, if they could. It is for them to show a compliance, and not for the Attorney General to show a negative, or non-compliance; and they should have stated in their answer how, and in what way they had complied with the act. They should have stated the facts, that the Court might judge whether they had, or had not complied; and not a conclusion of law, as they have done by their answer, without so much as showing the existence of the facts from which the conclusion is drawn.

Suppose an information filed against the defendants, in the Supreme Court, calling upon them to show by what authority they exercise the privileges and franchises of a bank. To the information the defendants would plead their charter, and the Attorney General would reply the act of last winter repealing it. What would be the next step? The defendants would put in a rejoinder admitting the replication, or the repeal of their charter, and then set forth the second section of the act, and proceed to allege a compliance with it, by a statement of facts showing how, and in what way they had complied. If the Attorney General deemed the rejoinder insufficient in *law, he would demur; or, if he supposed it sufficient in [*95] law, but not true in fact, he would put in a sur-rejoinder denying its truth, and the defendants would be compelled to establish its truth by evidence. Must the Attorney General prove more in this Court, to make out his case, than at law?

In foreclosure bills there is usually an allegation that a certain amount is due, and unpaid, at the time of filing the bill. If the defendant, by his answer, after admitting the execution of the mortgage, and the debt for which it was given, should deny there was anything due on it at the time of filing the bill, would the answer be evidence of that fact for the defendant; and would the complainant be required to prove the money had not been paid? If such be the rule of pleading in this Court, the pleader should be cautious what he states in his bill,

or he will make the defendant a witness for himself, to establish a defense that admitted and avoided the complainant's cause of action. The rule is, that, where the answer is put in issue, the defendant must prove what he insists on by way of avoidance. *Hart* v. *Ten Eyck*, 2 J. C. R., 89.

Third. The agency in Detroit is a clear violation of the charter of the bank. By the charter, the bank was to be located at such place in the county of Oakland as a majority of the stockholders should direct, and it was located, in October, 1836, at the village of Pontiac. The cashier resides at Detroit, and has charge of the agency, and a large part of the funds of the bank is kept at the agency. By their answer, the defendants say the agency is confined solely to the redemption of the issues of the bank, and to the buying and selling of exchange as incident to, and connected with the redemption of their issues; and they deny that any discounts have been made at the agency. A brief statement of facts, taken from the answer, [*96] *will show the extent and kind of business done at both the bank and agency.

While the bank is charged with $1,831 of the bills in circulation, the agency is charged with $6,633. While the deposits at the bank amount to $30 only, at the agency they amount to $6,337.19. While the bank has specie and other assets, at Pontiac, to the amount of $3,011.55, it had at its agency in Detroit, in specie, drafts, and funds deposited in Eastern cities, $28,662.57. These facts, of themselves, show that nearly the whole business of the institution was done at its agency in Detroit, and not at Pontiac where the bank is located. It is immaterial, so far as it regards the violation of its charter, whether discounts were made at the agency, or not.

Deposits were received, drafts bought and sold, and the bills of the bank put in circulation, at the agency; all which the corporation, by its charter, had no right to do in Detroit, or at any other place except Pontiac, where the bank is located. In the case of *The People* v. *The Trustees of Geneva College*, 5 Wend. R., 211, which was an incorporated college in the village of Geneva, in the western part of the State of New York, it

was held that the trustees had no power to establish a medical school in the city of New York, or at any other place than Geneva, where the college was located. The Chief Justice, in delivering the opinion of the Court in that case, says, "In answering this question, we have only to return to the fundamental principle relating to artificial beings, that they have such powers and capacities as are given to them, and none other. This corporation, by the very terms of its charter, is restricted as to place, as much so as is the Bank of Geneva. Suppose the Bank of Geneva were to establish an office of discount and deposit in the city of New York, could they justify such a proceeding? It may *be answered the charter of this [*97] bank contains an express prohibition against carrying on business elsewhere; but without such prohibition, there could be no question on the subject, and it would be no answer to say that the bills are signed in Geneva." An authority to do a thing at one place is no authority for doing it at another and different place. It would be idle for the legislature to locate a bank, if the institution could perambulate the State, and establish agencies whenever and wherever it might think it for its interest.

A corporation is an artificial being, created by law with limited powers, and for specified purposes; and there is a tacit condition annexed to its charter, that it shall exercise its franchises in the manner and for the purposes specified therein, and for no other purpose, and in no other manner; and every abuse of its powers is a violation of the law of its being, and a forfeiture of its franchises. *Commonwealth* v. *The Union and Marine Insurance Company*, 5 Mass. R. 232; 9 Mass. R. 427; Story J. 9 Cranch R. 51; 2 Kent Com. 312; Ang. & Ames on Corp. 510, and cases there cited.

Fourth. It was insisted that the act of 1837 was not imperative, but left it discretionary with this Court, to grant the injunction or not; and that, as the Attorney General had instituted proceedings against the bank in the Supreme Court, and it did not appear that the public would sustain any injury if the institution should be permitted to proceed with its business,

until the question could be settled in that Court, the injunction should for that reason, if no other, be dissolved.

The bill is not filed under the first two sections of the act of 1837, but under the third, and subsequent sections. Under the first and second sections, this Court is authorized to re-
[*98] strain by injunction, the exercise of a franchise, *after proceedings have been instituted at law to test the right to the franchise, 1st, In the case of a corporation assuming any franchise, liberty or privilege, or transacting any business not allowed by its charter; and, 2d, Where individuals claim any corporate rights, privileges, or franchises, not granted to them by law. In these two cases, the jurisdiction of the Court extends no further than to restrain the corporation or individuals, as the case may be, from exercising the franchise claimed by them, until the question of right is settled at law. An injunction, therefore would not be granted unless the usurpation was clear, or it being doubtful, unless there was danger to the public while the question was being tried at law. But, under the other sections of the act, the powers of this Court are more extensive against *corporations having banking powers.* It has power not only to restrain such corporations, by injunction, from exercising their corporate powers, but to appoint a receiver to take charge of their property and effects, and to decree their dissolution, in the following cases: 1st. When the corporation is insolvent; 2d. When it refuses to pay its debts; and, 3d. When it has violated any of the provisions of its charter, or act of incorporation, or any law binding upon it. Under the statute this Court has greater power over banking corporations than the Supreme Court. It may not only enforce a forfeiture of their franchises, by dissolving them, for a violation of their charters, but it may appoint a receiver to take charge of their effects, for creditors, and compel the officers and stockholders to discover the same under oath.

Whether the Attorney General should be allowed to proceed in this Court and at law at the same time, or should be
[*99] required to make his election in which court he will *proceed, is a question not now before me, and one that it

will be time enough to decide, when it is properly brought before the Court.

Motion denied.

The President, Directors and Company of the Bank of Michigan *v.* Johnson Niles.

Where a bank had power under its charter to take and hold lands for the convenient transaction of its business, and to secure debts, but for no other purpose, *it was held*, it had no right to purchase lands for the purpose of selling them again; and the Court refused to assist it in enforcing a contract made with that intent.[1]

A purchase after the contract was made, in part performance of it, will not change the case.

The bill in this case was filed to obtain the specific performance of a contract entered into by the parties on July 1st, 1839. The complainants bound themselves to convey to defendant, within sixty days thereafter, certain real estate described in the contract, and to obtain from one Jeremiah H. Pierson a good and sufficient deed of the Rochester mill property, and convey to him three undivided fourth parts of it; and, in case a mortgage should be given by them on the mill property, for the purchase money, they covenanted to pay the incumbrance, and cause it to be discharged within five years. The defendant, in return, agreed to execute a mortgage to complainants for the purchase money to be paid by him, amounting to $28,000, on the property to be conveyed, and on certain other property named in the contract. Within the sixty days, *complainants purchased and obtained a deed of the [*100] mill property from Pierson, for $5,000, which they paid and secured to be paid to him. They then made out and executed a deed to defendant for three-fourths of it, with the other

[1] See Attorney-General *v.* Oakland County Bank, *ante*, 90.

property they were bound by the contract to convey to him, and were ready and willing to perform their part of the contract.

The defendant demurred.

G. M. Williams and A. D. Fraser, in support of the demurrer.

J. F. Joy, contra.

The Chancellor. The first objection made by defendant is, that the bank had no authority under its charter to make such a contract as that disclosed by the bill; and that this Court will not, for that reason, decree a performance of it.

The third section of the act of incorporation concludes with these words: "The President, Directors and Company of the Bank of Michigan shall be in law capable of purchasing, holding and conveying any estate, *real* or personal, for the *use* of the said corporation." By the ninth section, it is provided, "That the lands, tenements and hereditaments, which it shall be lawful for the said corporation to hold, shall be only such as shall be required for its accommodation in relation to the convenient transacting of its business, or such as shall have been *bona fide* mortgaged to it by way of security, or conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or purchased at sales upon judgments, which shall have been obtained for such debts."

The power given by the third section to purchase, hold, and convey real estate, is limited by the ninth section to [*101] *specific objects. Taking the two sections together, the intention of the legislature is clear, and but one construction can be given to them. It was intended that the corporation should have power to purchase real estate for the convenient transaction of its business, or to secure a debt; but not for the purpose of investing its capital, or of speculating in lands, or of buying them merely to sell again. I have no doubt this is the true construction of the charter. A different construction would enable the corporation to buy and sell real estate at pleasure, and render entirely nugatory the restric-

tion imposed by the ninth section. The corporation, then, exceeded its powers, and contracted to do what it had no right to do under its charter, when it covenanted to purchase the mill property of Pierson, and convey three-fourths of it to defendant. It was an agreement to buy real estate of one individual to sell to another;—a contract to violate its charter, by embarking in a business with which it had no right to meddle;—a contract which, for that reason, this Court cannot, consistently with equitable principles, assist the complainants to carry into execution. Equity will aid no one in doing that which is unlawful.[1]

The purchase of the mill property of Pierson for $5,000, after the contract was made, makes no difference; for it was done under the contract, and in part performance of it. The case of the *The Banks* v. *Poitiaux*, 3 Rand. R. 136, goes no further than this, that the corporation having purchased the land, might make a deed of it; not that it might make a contract with A. to purchase the lands of B., and sell them to A., which is the case before me.

It is unnecessary to decide the other questions made on the argument.

Demurrer allowed.

NOTE. This case was affirmed on appeal, 1 Doug. 401.

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*MARK NORRIS *v.* ALANSON M. HURD *et al.* [*102]

Where a bill was filed to correct a mistake in the description in a deed, of land which had been surveyed and located, *but it was not sought to change the location*, and T. held a lot described in his purchase deed as bounded by such land, held that he need not be made a party, as his interests would not be affected by the decree.

[1] See Smith *v.* Barstow, 2 Doug. 155; Orr *v.* Lacey, id. 230; Hurlbut *v.* Britain, id. 191.

A witness is presumed to be competent until the contrary is shown.

Where a defendant, against whom a decree was sought, was examined as a witness, his deposition was suppressed; and it was *held*, that the examination did not operate as a release, but that a decree might still be had against him, if warranted by other evidence.

Where a lot which had been surveyed, located, and platted on a diagram, was sold by an erroneous description, but the purchaser and all succeeding holders occupied it as marked out by the survey, a decree was made to correct the mistake, and releases were ordered to be made between the parties whose lands were affected by the erroneous description, to make their lots conform to the location.[1]

This was a bill to correct a mistake in a deed of two lots of land in the village of Ypsilanti. It appears that, on the 29th of December, 1832, the complainant sold to Hurd the lots referred to, and gave him a bond for a deed. The lots were described in the condition of the bond as situate in the township of Ypsilanti, on the east side of the River Huron, directly south of, and adjoining a *highway* running east and west across the river, a few rods north of the mills then owned by Mark Norris and Timothy McIntire. The first lot was therein bounded as follows, viz: Beginning *north thirty degrees west, one chain and fifty links* from the northeast corner post of the headgate that lets the water from the east side of the dam, which supplies water to the aforesaid mills of Mark Norris and Timothy McIntire, to the saw-mill canal leading from said dam to Norris Wood's saw mill, thence north sixty-nine de-
[*103] grees* forty-five minutes east six chains and twelve links, thence south twenty-three degrees and thirty minutes east four chains, thence south sixty-nine degrees and forty-five minutes west four chains and eighty-nine links; thence north parallel to the center of *said canal* to the place of beginning, containing by estimation two acres and thirty-two rods. The other lot begin-

[1] In order to warrant the reformation of a deed on the ground of mistake, the mistake must not only be mutual, but must be admitted or distinctly proved. Tripp *v.* Hasceig, 20, Mich. 254; Case *v.* Peters, id., 298; Youell *v.* Allen, 18 id. 107; Ludington *v.* Ford, 33 id. 123.

Mistake as to the legal effect of an instrument is no ground for equitable relief. Martin *v.* Hamlin, 18 Mich. 354.

ning *south sixty-nine degrees forty-five minutes west, seventy-nine links from the south-west corner of the first lot;* thence south sixty-nine degrees forty-five minutes west, three chains and forty-two links; thence north thirteen and a fourth degrees east, two chains and thirteen links; thence north forty-four degrees fifteen minutes east one chain and fifty links; thence south forty degrees east, two chains and fifty-eight links to the place of beginning, containing forty-nine hundredths of an acre. The two lots were separated from each other by a strip of land seventy-nine links wide for the *saw-mill canal;* the larger and first above described lot lying east of the canal, and the other west of it. The alleged error in describing the lots in the condition of the bond, which error ran through all the subsequent conveyances, consisted in erroneously describing the beginning or northwest course of the lot lying east of the canal. It was described in the condition of the bond as *north thirty degrees west, one chain and fifty links* from the northeast corner post of the headgate, that let the water into the canal, whereas the bill stated it should have been described as *north twenty-three degrees fifteen minutes west, one chain and fourteen links* from the northeast corner post of the headgate. The several persons through whom the title had passed were made defendants, all of whom allowed the bill to be taken as confessed, except Timothy Showerman and Hiram Thompson, the then owners of the lots. They filed a joint and several answer denying all knowledge of the mistake, to *which a replication was filed by complainant. The [104*] bill waived an answer under oath.

Kingsley & Backus, for complainant.

C. W. Lane, for defendants, Showerman and Thompson.

The Chancellor. Before I proceed to the merits of the case, it is necessary to decide two or three preliminary questions.

1. It is insisted that Jesse W. Taylor should be made a party. It appears from the evidence that complainant, in July, 1838, and soon after he had given a deed to Hurd, sold village lot No. 308, to Taylor, which lot is described in Taylor's deed to be bounded on the north by land deeded to Hurd. Taylor's

lot lies south of the lot east of the canal. The lots sold to Hurd were surveyed and located by the parties long before Taylor purchased. The mistake in the deed to Hurd gives them a different location. It carries the north and south boundary lines about forty links north of their actual location. and the east and west boundary lines a little to the west; so that a correction of the error would not affect the interest of Taylor. It would would only be correcting the deed, so as to make it agree with the actual location. If the object of the bill was to change the actual location of the lots,, and to carry them further south, so as to take in a part of Taylor's lot, it would be necessary to make him a party; but as that is not the object of the suit, I cannot see he has any interest in it one way or the other. Besides, Taylor's deed does not refer to any particular deed, but describes his lot as bounded " north by land heretofore deeded to A. M. Hurd. By whom and when is [*105] not stated. He therefore was not *governed in his purchase by complainant's deed to Hurd, but by the location that has been made of the lots.

2. Two of the defendants, Compton and Thompson, were examined as witnesses by complainant, and it is moved to suppress their depositions. The bill is taken as confessed against Compton, and it does not appear from the pleadings and proofs by what kind of a deed he conveyed to Church and Showerman. If it was by a quit claim only, he would be a competent witness for either party. 1 Cow. R., 613; 2 Stark. Ev., 786. A witness is presumed to be competent until the contrary is shown. But complainant asks no decree against Compton, although he is a party to the suit, and his interest, if any, is adverse to the complainant.

Thompson is situated differently. He and Showerman are the present owners of the lots as tenants in common, and complainant asks a decree against them. His deposition therefore must be suppressed. But complainant may still have a decree against him and Showerman, if there is sufficient evidence left to warrant it. The rule on this subject is not as supposed by the defendants, that the examination of a party as a witness is an

equitable release to him, so that a decree cannot be had against him, except on matters to which he was not examined. In *Thompson* v. *Harrison*, 1 Cox Ca., 344, the complainant executed a release to one of the defendants, and then examined him as a witness in the cause. In that case it was the *release*, and not the examination, that precluded the complainant from obtaining a decree against the other defendant who was only secondarily liable, the defendant who was examined as a witness, and who had been released for that purpose, being primarily liable. In *Massy* v. *Massy*, 1 Beat. R., 353, one of the defendants was examined as a witness on behalf of the complainant, but the case was *fully made out by the bill [*106] and answer. The Chancellor, adverting to the fact that the record made out the case, decided that the deposition might be suppressed, and a decree be made as if the party had not been examined. Chancellor Walworth, in *Bradley* v. *Root*, 5 Paige R., 637, says, "The reason of the rule that the complainant cannot have an adverse decree against a defendant as to a part of the case to which he has examined him as a witness, is, that it would be charging him upon his own evidence, which can only be obtained against himself by proper charges in the bill, and by calling upon him to answer in the usual way."

3. I have no doubt from the evidence a mistake was made, first in the bond and afterwards in the deed to Hurd, in describing the course and distance of the northwest or beginning corner of the east lot, from the northeast corner post of the headgate to the canal. The premises were surveyed and staked out by Pettibone, at or about the time the purchase was made, and before the bond was given, in the presence, and under the direction of complainant and Hurd, who agreed upon the starting point; and a diagram of the lots was made, showing the courses and distances, which, with the beginning corner, were also stated in writing at the foot of the diagram, with a blank left for the course and distance from the headgate to the beginning corner. The canal was dug at the time of the survey, and a pit prepared for the headgate, the timber for which was on the ground, and the blank was left to be filled up by the true

course and distance to be ascertained after the headgate was erected. This blank, however, as appears from the diagram which is an exhibit in the cause, has never been filled. By what means the course and distance were ascertained when the bond was given, whether by survey or conjecture, does not appear.

[*107] *There is no evidence of a change of location after the survey by Pettibone. If anything of the kind had taken place, it is highly probable a new survey would have been made, and that the stakes of the former survey would have been removed, and made to correspond with the new location. That no change was made is evident from what afterwards took place. The bond agrees with the diagram, in describing the east lot as situate directly south of, and adjoining a highway, clearly indicating that no part of the highway was to be included, one-half of which would, however, be included under the erroneous description of the beginning corner given in the bond. Hurd took immediate possession of the lots, and built a fence on the south side of them; and in building this fence, as well as one or two other fences, he was governed by the stakes placed in the ground by Pettibone when he made the survey. Hurd always occupied the lots as surveyed; and there can be no doubt complainant supposed, when the bond was given, that he was selling, and Hurd that he was buying, the and that had been surveyd by Pettibone, and none other. All who have owned and occupied the premises since that time, have occupied them according to the survey; and there is no evidence that any one of the defendants, when he purchased, supposed he was purchasing any other than the premises subsequently occupied by him. Apple trees were set out, and a barn was built so near the south fence as to be excluded from the premises by the deed. The question of a *bona fide* purchaser, therefore, does not arise in the case. The complainant does not ask to take away anything from Thompson and Showrman which they supposed they were purchasing when the premises were deeded to them. Sage, Edmunds, Godard and Stuart, when they purchased, were shown the diagram of

the survey made by Pettibone, and *it is to be pre- [*108]
sumed they were governed more by that, in making their purchase, than by the stake pointed out to them as the northwest corner of the east lot. Why was the diagram shown to them, if it was not a true representation of the property they were about to purchase? None of them supposed at the time they were purchasing any part of the highway. The deed to Edmunds, Godard and Stuart, describes the east lot as lying *directly south and adjoining the highway*, following the description of the premises contained in the bond to Hurd, which bond Sage saw at the time he purchased for his son.

On the west lot there is a furnace supplied with water from complainant's dam, and the bone of contention between the parties is not whether the east lot shall take in one-half of the road to the north of it, but whether the furnace lot shall be carried about two rods further north, and nearer complainant's dam,—the southeast and beginning corner of the furnace lot being on the south line of the east lot, seventy-nine links westerly from the southwest corner of it.

A decree must be entered declaring the northwest or beginning corner of the east lot to be north twenty-three degrees twenty minutes west, one chain and ten links from the northeast corner post of the headgate that lets the water into the canal, (that being the true course and distance, as appears by a survey made since the suit has been pending,) and not north thirty degrees west one chain and fifty links from the said headgate, which last course and distance, instead of the first, were, by mistake, put in the deed from complainant to Hurd, and have been transferred from Hurd's deed into all the subsequent conveyances of the premises down to and including the deed to Thompson and Showerman. And Thompson and Showerman, by a quit claim deed reciting these facts, must release to *complainant such parts of the premises included in the [*109]
aforesaid erroneous description as are not included in the corrected description; and complainant, by a similar conveyance, must release to Thompson and Showerman such parts of the premises included in the corrected description as are not

included in the aforesaid erroneous description. The form of the releases, if the parties cannot agree, to be settled by a Master of this Court, and each party to pay his own costs, and be at the expense of drawing and acknowledging the release to be executed to the opposite party.

Cogswell K. Green, Receiver of the Bank of Niles, *v.* Pomeroy Stone *et al.*

To give this Court jurisdiction, where recovery is sought of the amount of a lost note, it is not necessary that it should have been lost before due.[1]

The bill in this case was filed to recover the amount of a lost promissory note, for $500, dated March 12th, 1838, and made by the defendant Norton, payable to the defendants Stone and Everts, at the Bank of Niles, ninety days after date, and indorsed by them, and discounted by the bank. The note was lost after it became due.

C. W. Lane, for complainant.

N. R. Ramsdell, for defendant Stone

The Chancellor. The note was negotiable, and had been indorsed by the payees. To give this Court jurisdiction, [*110] it is not necessary that it should have been lost *before it was due. In *Rowley* v. *Ball*, 3 Cow. R., 303, and *Poole* v. *Smith*, 1 Holt R., 144, it was held a recovery could not be had at law on a lost note, although it was past due when it was lost.

Decree for complainant.

[1] See Comp. Laws, 1871, § 5, 945, *et seq.*

Horace H. Comstock *v.* Jacob M. Howard and Albert Stewart.

Where S. held a judgment against C., and C. executed a deed to H. as trustee, authorizing him, in case the debt was not paid in six months, to sell the land, it was *held* that the deed was a mortgage, and to bar the equity of redemption, it should have been foreclosed at law, or by bill in this Court.[1]

This was a bill to redeem certain premises which had been sold, and bid in by one of the defendants.

The defendant, Howard, obtained a judgment against complainant, in favor of Stewart, the other defendant, for $3,425.24, on June 17th, 1839, in the Circuit Court of the United States for the District of Michigan. A *fieri facias* was issued, and, on June 27th, Comstock called on Howard, and offered to give security for the payment of the judgment, if Howard would not cause a levy to be made on his property within six months, or would stay the execution for that time; and, on the same day, he deeded to Howard, as trustee, certain real estate as security, and authorized him to sell and dispose of it, and apply the money in payment of the judgment, and to execute and deliver to the purchaser a deed, provided the judgment and costs were not paid within six months from that time. In February, 1840, the judgment still remaining unpaid, *Howard advertised the lands to be sold at public auction [*111] on the 28th day of March following, at the court house, in the village of Kalamazoo, at which time and place they were sold to Stewart for $200, he being the highest bidder, and were deeded to him by Howard.

Stevens & Pratt, for complainant.

Van Arman, for defendants.

[1] See Campau *v.* Chene, 1 Mich., 400.

Once a mortgage, always a mortgage. Thompson *v.* Mack, Harr. Ch., 150; Batty *v.* Snook, 5 Mich., 231.

The Chancellor. Is the deed from Comstock to Howard a mortgage to Howard in trust for Stewart? If it is a mortgage, and not a common deed of trust by a debtor for the benefit of a creditor, Comstock has a right to redeem, on paying Stewart what is due on the judgment.

Chancellor Kent defines a mortgage to be the conveyance of an estate by way of pledge for the security of a debt, and to become void on the payment of it. 4 Kent Com., 135. The deed, on its face purports to be given as security for the payment of the judgment, and Howard is not authorized to sell *generally*, but only on the happening of a *contingency*, viz: the non-payment of the judgment within six months. The fact that the debt is due to Stewart, instead of Howard, does not make it any the less a mortgage. It is not unusual for mortgages to be given to one person in trust for another. 1 Madd. Ch. 514; 4 Kent Com. 146; *Clay* v. *Sharp*, 18 Ves. R. 346, note. To have barred the complainant's equity of redemption, Howard should have foreclosed the mortgage, either at law, by advertising and selling under the statute, or in this Court by bill.

It appears that a part of the judgment has been collected on one or more executions. There must, therefore, be a reference to a Master to ascertain the amount still due on the judgment, and all further questions are reserved until the coming in of the report.

[*112] *Calvin C. White *v.* William Forbes.

Walker. 1 w 112 66 385

The Court of Chancery may stay or prevent nuisances by injunction, and the complainant will not be first required to establish his right at law, unless doubtful, and in dispute.[1]

[1] The provision of the Rev. Stat. of 1846, p. 509, (Comp. Laws, 1871. § 6, 377) conferring jurisdiction, in cases of insurance, on equity courts, was not intended to extend or enlarge their jurisdiction. Norris *v.* Hill, 1 Mich., 202.

Where the aid of this Court is sought to protect the enjoyment of property, it will not be governed by the mere value of the property, but will interfere if the injury will materially lessen the enjoyment of it by the owner.

A perpetual injunction was granted to prevent the erection of a dam, which would have flooded the lands of complainant, on the grounds of injury to the property, and the probability that disease would be generated by the overflowing of the water.

THIS was a bill for a perpetual injunction to prevent defendant from erecting a mill-dam of such height as to overflow complainant's land.

Complainant is the owner of the east half of northeast quarter of section eighteen, town one north, range eleven east. Gun River passes through it from east to west, and divides it into two nearly equal parts; and there are between eleven and twelve acres of low bottom land lying on the margin of the stream, between it and the high land back from the river. The banks in some places are high, and the bottom land lies in three different pieces, two of which are on the south side of the river. One of these lies on the west side of the lot, and contains about half an acre, and the other is on the east side, and contains nine and a half acres. The other piece is on the north side of the river, and contains an acre and a quarter. In 1837, the defendant erected a mill and dam on the river, a short distance below complainant's land. The dam caused the water to rise on complainant's land, and to overflow and render useless, for agricultural purposes, two *of the afore- [*113] said pieces, containing together about two acres, and also between four and seven acres of the other piece, besides materially injuring the balance of it. All the three pieces, with a little ditching on a small portion of the largest one, could be made into good meadow land, if the river were allowed to flow in its natural channel, unobstructed by the dam. In March, 1840, the dam was carried away by a freshet, and in October following the complainant filed his bill.

Stuart, for complainant.

Stevens, for defendant.

The Chancellor. This Court may stay or prevent nuisances by injunction. R. S. 499. *Gardner* v. *Village of Newburgh*, 2 J. C. R., 162. Sometimes the complainant is required to establish his right at law, before equity will protect him by injunction in the enjoyment of it; but that is only when the right on which he bases his claim to the interposition of the Court is doubtful, and in dispute.

It is contended that the injury is too inconsiderable in itself for the Court to take cognizance of this case, and that the statute requires the Court to dismiss every suit concerning property, except between partners or for the foreclosure of mortgages, where the matter in dispute does not exceed one hundred dollars. R. S. 365; Laws 1839, p. 221. This is not a suit to settle the title to property. All the complainant asks is to be protected in the enjoyment of property, about the title to which there is no dispute. The question presented is, whether or no the defendant shall be allowed to erect a dam on his own land, to such a height as to flow the land of complainant, lying on the river a short distance above defendant's [*114] mill. It *is not denied, but on the contrary is admitted, that the old dam, before it was carried away by the freshet, caused the water to overflow more or less of complainant's land. The defendant does not place his defense on this ground, but upon another and different ground, viz: that the land so overflowed, and which will be again, if he is allowed to erect a new dam of the same height with the old one, is of little or no value, and the flowing of it not productive of any serious injury. The evidence on this point is conflicting. Some of the witnesses think it would do little or no injury, while others estimate the damages at from $300 to $500. The extent of the injury, provided there be a substantial injury done, is of no very great importance. Every man has a right to the enjoyment of his property undisturbed by another, and to be protected in that enjoyment; and, what one may consider of little value, another may esteem very highly. The Court will not, in cases of this kind, be governed by dollars and cents alone, but will inquire whether the injury is of such a nature,

that it can reasonably be supposed to lessen materially the enjoyment of property by its owner.

The complainant lives on the premises. They are his home. He places a high value on the land, and wants it for a meadow; and he is apprehensive that the flooding of it will generate disease, and render the atmosphere of his dwelling less salubrious.

Injunction made perpetual, with costs.

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*Enoch Jones *v.* James Smith. [*115]

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The filing of a judgment creditor's bill, without answer or the appointment of a receiver, creates no lien upon the debtor's property; and complainant, upon defendant's decease in such case, loses his right to prosecute the suit.

This was a petition under the statute to revive a judgment creditor's suit against the personal representatives of the deceased debtor.

The petition stated the filing of a judgment creditor's bill against James Smith, Jun., in his lifetime, the service of a subpoena on Smith, and his death before any further proceedings were had; and that Joseph Addison Smith had been appointed administrator. It prayed a revival of the suit against the administrator, and that he might be required to answer the bill, and be decreed to pay petitioner's debt out of the assets in his hands, in preference to the other creditors of the deceased.

Balch, for petitioner.

The Chancellor. If Smith had died between the return of the execution and the filing of the bill, the complainant could not have filed his bill against the administrator. Is this, then, one of those cases that may be revived against the personal representatives of a deceased defendant? I think not, under the circumstances of the case.

The statute does not make the filing of the bill a lien on the property of the debtor. It authorizes the Court to decree a satisfaction of the amount remaining due on the judgment, out of any personal property, money, or thing in action, be-
[*116] longing to the debtor; and arms the Court *with power to compel a discovery of the debtor's property, and to prevent his transferring it. The statute goes no further, but, by a law of the Court, the creditor who first files his bill, by his diligence, acquires a right to have his debt paid out of the *choses in action* belonging to the debtor, before other creditors are paid who are less vigilant.

This preference, or priority of payment among creditors, is sometimes called a lien in the books. But there is not much resemblance between it and a lien, before the specific property out of which the creditor is to be paid has been ascertained by the answer of the debtor, or transferred to a receiver in the suit. Until then there is nothing specific for the lien to attach. Here no answer was filed, nor was any receiver appointed in the lifetime of Smith; and, unless the filing of the bill, without further proceedings, created a lien on such property as Smith might have had at the time, which I am of opinion it did not, the petitioner, by the demise of Smith, has lost his right to prosecute his proceedings further. The suit had not progressed so far as to create a lien; and the administrator stands in the same relation to petitioner as if no bill had been filed against his intestate.

Prayer of petition denied.

*Henry Thomas *v.* Stone & Graham. [*117]

A plea of a *bona fide* purchaser without notice, must aver, not only a want of notice at the time of the purchase, but also at the time of its completion, and the payment of the money. The money must have been actually paid before notice.[1]

It is not enough that the party has secured the money; he must have paid it, or become bound in such a way that this Court could not relieve him from the payment of it.

A complainant cannot examine as a witness a defendant against whom he seeks relief; if his answer is insufficient complainant should except, and if his testimony is sought to facts not stated in the bill, it should be amended.[2]

This was a bill to foreclose a mortgage.

The complainant, January 31st, 1837, in consideration of $900, conveyed to Stone certain real estate situate in Auburn, Oakland county, and took back a mortgage on the same premises, for $800 of the purchase money. On the 24th day of August following, and before the mortgage to Thomas was recorded, Stone conveyed the premises to Graham by warranty deed, which was recorded on the same day. The bill charged Graham with notice of the mortgage when he purchased, and that nothing had been paid by him to Stone. Graham, by his answer, denied all notice, and stated that, at the time of the execution of the deed to him, he executed and delivered to Stone his obligation for $200, which was unpaid, and also a bond in the penal sum of $800, conditioned to reconvey a part

[1] Dixon *v.* Hill, 5 Mich., 404; Warner *v.* Whittaker, 6 id., 133; Blanchard *v.* Tyler, 12 id., 339; Stone *v.* Welling, 14 id., 514; Kahl *v.* Lynn, 34 id., 360, a chattel mortgage. See, also, Moshier *v.* Knox College, 32 Ill., 155; Metropolitan Bank *v.* Godfrey, 23 id., 606; Keys *v.* Test, 33 id., 316; Kiser *v.* Hueston, 38 id., 252; De Wolf *v.* Pratt, 42 id., 210; Powell *v.* Jeffries, 4 Scam., 390. Otherwise in Illinois as to personal property, O'Neill *v.* Orr, 4 Scam., 1.

[2] The Laws of 1861, p. 168, (Comp. Laws, 1871, § 5966, *et seq.*) made parties to suits, and other interested persons competent witnesses. As to the construction of this act, see Goodrich *v.* Allen, 19 Mich., 250; Kimball *v.* Kimball, 16 id., 211; Wright *v.* Wilson, 17 id., 192; Moulton *v.* Mason, 21 id., 364.

of the premises to Stone, on his return from the South, where he expected to be gone five years. The bill was taken as confessed against Stone, who was a non-resident defendant.

Several witnesses were examined by complainant; and [*118] Graham, by consent of the parties, was *examined concerning the consideration that had been paid by him.

O. D. Richardson, for complainant.

Wm. Draper, for defendant Graham.

The Chancellor. The mortgage to Thomas and the deed to Graham, were given long before the revised statutes took effect; and, by the statute in force at the time for the registry of mortgages, it was provided that no mortgage, nor any deed, conveyance, or writing, in the nature of a mortgage, should defeat or prejudice the title or interest of any *bona fide* purchaser of any lands or tenements, unless the same had been duly registered. Laws of Michigan, (1833) p. 284.

A plea of a *bona fide* purchaser without notice must aver not only a want of notice at the time of the purchase, but also at the time of its completion, and of the payment of the money. The money must have been actually paid before notice. If a part has been paid, and a part remains unpaid, the purchaser will be protected in what he has paid, but not in any subsequent payments made by him. *Frost* v. *Beekman*, 1 J. C. R. 301; *Jewett* v. *Palmer*, 7 J. C. R. 65. This is what is meant by *bona fide* purchaser in the act referred to. *Dickerson* v. *Tillinghast*, 4 Paige R. 215. There is no difference "between a purchaser in good faith, under the recording act and a *bona fide* purchaser within the decision of Courts of Equity in other cases." *Grimstone* v. *Carter*, 4 Paige R. 421. The registry laws were designed to protect subsequent purchasers and mortgagees, who had parted with their money, and taken a deed, against prior conveyances by their grantors, of which they had no notice. They were not made for the protec- [*119] tion of prior purchasers or mortgagees, who *stood in need of nothing of the kind. But equity will not per-

mit a subsequent purchaser to use what the law has placed in his hand as a shield, for a purpose not necessary to his protection, and to the injury of a prior *bona fide* purchaser. By the English registry laws all prior conveyances are declared fraudulent and void against subsequent purchasers, whose deeds are first recorded. Sug. on Vend. 498. And, at law, the last conveyance, when first recorded, carries with it the legal title, although the vendee had notice of the prior conveyance; but in equity, where the intention is looked at, rather than the words of the registry act, he is held to be bound by the previous conveyance. Sug. on Vend. 511, Ed. of 1820.

Graham denies he had any notice of the mortgage when he purchased; and there is no positive evidence on that point. The transaction, when viewed in all its parts, looks much like a piece of contrivance to defraud Thomas. It is not necessary, however, to go into the testimony; for, admitting Graham had no notice of the mortgage, still he is not a *bona fide* purchaser. He has paid nothing. It is not enough that the party has secured the purchase money; he must have paid it, or become bound for it in such a way that this Court could not relieve him from the payment of it; as, by a promissory note, which had been negotiated, or the like. The bond for $200, if it has been assigned by Stone, (of which there is no evidence,) would, in the hands of the assignee, be subject to all equities existing against it before it was assigned.

I give no credence to the testimony of Graham taken as a witness in the cause. It is at war with his answer, and both cannot be true, although both are under oath.

The complainant had no right to examine him as a witness. If he had not answered to the bill fully, the complainant should have excepted to his answer; or if he *wished [*120] his answer to facts not stated in the bill, he should have amended his bill for that purpose. *Norris* v. *Hurd*, ante, 102. If he had been examined under the fifty-fifth rule of the Court, which saves the question of competency till the hearing, his deposition would be suppressed on the ground of interest; but

he was made a witness by consent, and an order of Court entered on a stipulation of the parties for that purpose.

Reference to Master to compute amount due, etc.

Thomas B. W. Stockton and Chauncey S. Payne *v.* Gardner D. Williams, Kintzing Pritchette, Calvin Smith, Thomas J. Drake, and Elizabeth Lyons.[1]

Where parties are trying the right to lands at law, and the title of the defendants at law is a legal and not an equitable title, with nothing to prevent their establishing it as fully at law as in a court of equity, this Court will not interfere, but will leave them to establish their defense at law.[2]

Where the defendant in such case, instead of demurring, submits to answer, and does not in his answer insist on the objection as a bar to the jurisdiction of the Court, and proofs are taken in the cause, it is too late to raise the objection at the final hearing.

Where a treaty makes no special provision for deciding questions of individual identity, they must be decided by the judicial tribunals of the country.[3]

A complainant under the act of 1840, must show a *complete* title in himself, or a right to such title, before he can call upon a defendant to release.[4]

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[1] Affirmed in 1 Doug., 546.

[2] See Moran *v.* Palmer, 13 Mich., 367.

[3] See S. C. 1 Doug., 546; Campau *v.* Dewey, 9 Mich., 381.

[4] See S. C. 1 Doug., 546.

In a bill to quiet title, it is sufficient, *prima facie*, that the complainant makes out a title apparently good as against the defendant. Hall *v.* Kellogg, 16 Mich., 135; Rayner *v.* Lee, 20 id., 384.

See also, generally, Blanchard *v.* Tyler, 12 Mich., 339; Salisbury *v.* Miller, 14 id., 160; Barron *v.* Robbins, 22 id., 35; Hanscom *v.* Hinman, 30 id., 419; Dale *v.* Turner, 34 id., 405.

A bill to quiet title cannot be maintained against one in adverse possession, nor can the legislature confer such a right. Tabor *v.* Cook, 15 Mich., 322. See, also, Barron *v.* Robbins, *supra*. Nor will a bill lie to quiet title to unoccupied wild lands not in the actual possession of either party. Jenkins *v.* Bacon, 30 Mich., 154.

By the treaty made at Saginaw, September 24th, 1819, the individual reservees obtained a legal title to the lands reserved, which attached as soon as the lands were located, and required no further action to complete it.[1]

The title to lands may pass by act of Congress, or treaty stipulation, as well as by patent.[2]

*By the Saginaw treaty, the Indian title to the lands reserved did not [*121] pass to the United States; but the treaty operated as a release both by the Indians and the government, of all interest which either had in the lands reserved in the respective reservees in fee simple.

Where a time had been set for the examination of one of the defendant's witnesses, and the commissioner and complainants' counsel attended and waited an hour and a half, during which time defendants did not appear with their witness, and complainants then left, refusing to wait longer, *held* that new notice should have been given them; and the deposition of the witness taken after complainants had left, without such notice was suppressed.

The reservations of certain lands in the treaty of Saginaw are public donations, made by the Chippewa nation to individuals; and, where two persons of the same name claim a particular reservation, hearsay evidence is admissible to show for whom it was intended. *General hearsay* or public reputation at the time of the treaty among the Indians and those present at it, and among the Indians since that time and before any controversy arose, is good evidence for that purpose; so is evidence of what a person has said before such controversy arose, who was present at the treaty, and would be likely from the circumstances to know for whom the donation was intended, and is dead. But evidence of the declarations of a living person under such circumstances cannot be received.[3]

What a witness has heard *post litem motam*, (by which is meant since the dispute has arisen, and not merely the commencement of suit,) is not evidence.

Where the complainants under the statute of 1840, in order to obtain the decree sought, were required to substantiate their own title, *held*, that the defense of one defendant enures to the benefit of the rest.

Bill to remove a cloud on complainants' title.

The bill was filed June 11th, 1840, and stated that, by a treaty between the United States and the Chippewa Indians,

[1] See S. C. 1 Doug., 546; Dewey *v.* Campau, 4 Mich., 565; S. C. 9, id., 381.

[2] See Ballou *v.* O'Brien, 20 Mich., 304; Johnson *v.* Ballou, 28 id., 379; Busch *v.* Donohue, 31 id., 481.

[3] See S. C. 1 Doug., 546; Campau *v.* Dewey, 9 Mich., 413.

concluded on the 24th of September, 1819, Mokitchenoqua alias Nancy Smith, (and since her intermarriage with Alexander D. Crane, Nancy Crane,) became entitled to a section of land near the Grand Traverse of the Flint river. That she was of Indian descent, and the reputed daughter of Jacob Smith, an Indian trader, and that she had always been known and recognized among the Chippewa Indians by the name of Mokitchenoqua.

That other sections were reserved at the same place for [*122] *other persons of Indian descent; and that, to give full effect to the treaty, it became necessary for the Executive of the United States not only to cause to be located and surveyed the several sections, according to the object, intent and meaning of the treaty, but also to designate, identify, recognize and put into possession of the different sections, the several individuals entitled to each; which was attended with many difficulties, by reason of the little intercourse which had existed between the claimants and the Indians on the one hand, and the citizens of the United States on the other; and because different persons claimed the same land under the same name. That the President caused the several sections that were to be located at the Grand Traverse, amounting in all to eleven, to by surveyed and located under the treaty; and designated section number eight on the plat of the survey for Mokitchenoqua. That the Secretary of the Treasury, under the direction of the President, instructed the Register and the Receiver of the land office at Detroit to investigate and determine the respective persons to whom the lands belonged; and that they, after investigating the matter, determined Nancy Crane was the person called Mekitchenoqua in the treaty, and certified their determination, and the evidence taken by them, to the general land office at Washington, which determination, after having been received by the commissioner of the land office, was confirmed August 5th, 1835, and a certificate given on the same day that Mokitchenoqua, alias Nancy Crane, formerly Nancy Smith, was entitled to said section eight, agreeably to the treaty. June 30th, 1835, Nancy Crane and her husband released all their interest to John Garland, from whom the com-

plainants derived their title; and she and her husband afterwards, February 10th, 1837, deeded two-thirds of the same to Calvin Smith and Thomas J. Drake, who were *charged with notice of Garland's deed. That, March [*123] 7th, 1840, a patent was issued to Mokitchenoqua, alias Nancy Crane, wife of Alexander D. Crane, formerly Nancy Smith. That Elizabeth Lyons, assuming the name of Mokitchenoqua, pretended and insisted she was the person meant by the treaty, and presented her claim to the Register and Receiver at Detroit, who gave her a certificate to that effect, which certificate was afterwards superseded by the certificate given to Nancy Crane. That Elizabeth Lyons, still pretending to have some right or interest, on the 4th of April, 1838, deeded the section to Gardner D. Williams and Kintzing Pritchette, who, in February, 1840, caused an action of ejectment to be brought against the complainant Payne. The bill prayed defendants might be decreed to release their claim to the premises, and Williams and Pritchette be restrained from prosecuting their action of ejectment.

Williams, by his answer, admitted the making of the treaty, the reservation by it of eleven sections of land at the Grand Traverse of Flint river, and that one of the number was reserved for a girl named Mokitchenoqua; but denied Nancy Smith was the person intended, or that she was known by that name among the Chippewa Indians. He also admitted the several sections had been surveyed, marked and numbered, and section eight assigned to Mokitchenoqua under the treaty; admitted the instructions given to the Register and Receiver of the land office at Detroit, and the patent of March 7th, 1840, as stated in the bill, but insisted that he and Pritchette were not affected by them. Stated that Elizabeth Lyons, the daughter of Archibald Lyons, an Indian trader, was the person intended by the treaty. That Mokitchenoqua was her Indian name, that it was given to her by the Indians when she was an infant, and before the treaty of *Saginaw; that [*124] the chiefs at the treaty intended to give her a section of land, and that the same was reserved for her by her Indian

name of Mokitchenoqua. That she received a certificate from the Register of the land office at Detroit; that she was Mokitchenoqua, and that she was the first, and for many years the only applicant, and received her certificate of identity August 2d, 1824. That Marie Lavoy received a like certificate February 7th, 1827, and Nancy Crane January 22d, 1831. That Elizabeth Lyons, on the 4th of April, 1838, conveyed to Williams and Pritchette, who had brought an action of ejectment against Payne.

Pritchette put in a similar answer, and the bill was taken as confessed against the other defendants, Elizabeth Lyons, Thomas J. Drake, and Calvin Smith.

Fraser, Romeyn and Davidson, for complainants.

Walker and Hunt, for Williams.

W. Hale, for Pritchette.

A. D. Fraser. The complainants are entitled to the relief sought, on the following grounds.

1. A patent having duly and according to law been issued by the government of the United States for the section of land in dispute, it is incumbent on the defendants to get rid of the patent, by taking the proper steps with that view, and showing that the officer who executed the same transcended his powers, or that the transaction was tainted with fraud.

To set aside the patent, the defendants must proceed directly, by *scire facias*, or bill in chancery.

2. *Adverse possession.* The defendants admit the possession, occupancy and improvements of the land in question,
[*125] *by complainants, prior to the date of the deed from E. Lyons to the defendants Williams and Pritchette. This operates as a bar.

3. *Champerty and maintenance.* The defendants conceding the occupancy and improvements of the complainants, any grant executed by any other person was void.

4. The pleadings admit the allegations in the bill of com-

plaint, and matter in avoidance or discharge set up in the answer, must be proved.

5. Indian testimony is not entitled to much if any weight at all.

The reporter has not been furnished with briefs by the other counsel for the complainants.

H. N. Walker, contra.

I. It appears by the treaty of Saginaw, of 1819, that the land in dispute was granted to an Indian girl named Mokitchenoqua. Each party claims to hold under the person named in the treaty, although their titles are derived through different individuals. The question of identity must be decided by the judicial tribunals.

II. The treaty is perfect, and conveys to the several persons named, the land mentioned, in fee simple. It is no objection to the grant that the land has to be designated by the President.

III. If Elizabeth Lyons was the person named in the treaty, the patent cannot give the complainants any title to demand a surrender of the claims of herself or her assigns.

1. A patent is no bar to the assertion of equitable rights existing before its date.

2. A grant is absolutely void where the state has no right or title to the thing granted, or when the officer has no authority to issue the grant.

*IV. The ground of adverse possession is no founda- [*126]
tion for offensive operations. If of any validity, it can only be set up as a defense.

V. The same objection applies to champerty and maintenance. We insist, moreover, that the doctrine of champerty and maintenance is not law in this State.

The Chancellor. The statute under which the complainants filed their bill, Laws 1840, p. 127, provides that any person, having the possession and legal or equitable title to lands,

may institute a suit against any other person or persons, setting up a claim thereto, and if the complainant shall be able to substantiate his title to such land, the defendant shall be decreed to release to the complainant all claim thereto. The defendants, Williams and Pritchette, insist that, inasmuch as they had brought an action of ejectment against Payne, for the purpose of trying their title at law, before the complainants filed their bill in this Court, the bill of complaint should be dismissed as to them for want of jurisdiction under the statute, which they contend should be construed to apply to claims only which the party was not proceeding to establish at law, at the time of filing the bill. The object of the statute seems to be to enable a person in possession of real estate, and having a title thereto, to remove all doubts in regard to his title arising from the claims of third persons who are taking no steps to test the validity of their claim, either at law or in equity, and who, by their refusal or neglect to institute proceedings for that purpose, keep the party in possession in a state of suspense. This is the extent, I think, to which this Court should go under the statute. A different construction of the act would leave it optional with every defendant in ejectment to litigate his title either at law or in this Court, and, by [*127] filing his bill here, to take from his *adversary the right to have the facts of the case passed upon by a jury of the country. Such, therefore, it seems to me, is the construction that should be given to the statute, where the title of the defendant in ejectment is a legal and not an equitale title, and there is nothing to prevent his establishing it as fully at law as in a court of equity. But the defendants come too late with their objection. They should have demurred to the bill, or insisted on the want of jurisdiction in their answer, as a bar to the Court's taking cognizance of the suit. *Grandin* v. *LeRoy*, 2 *Paige R.* 509. Where the defendant, instead of demurring, submits to answer, and does not insist on the objection in his answer as a bar to the jurisdiction of the court, and thereby put the complainant on his guard as to

further proceedings, and proofs are taken in the cause, it is too late to raise the objection on the final hearing.

Having disposed of the question of jurisdiction, I will proceed to decide such other questions raised on the argument, as are necessary to a decision of the case.

Article third of the treaty says: "There shall be reserved, for the use of each of the persons hereinafter mentioned, and their heirs, which persons are all Indians by descent, the following tracts of land;" and, after making a number of reservations, proceeds as follows: "For the use of Nowokeshik, Metawanene, Mokitchenoqua, Nondashemau, Petabonaqua, Messawwakut, Checbalk, Kitchegeequa, Sagosequa, Annoketoqua, and Taweumegoqua, each, six hundred and forty acres of land, to be located at and near the Grand Traverse of the Flint river, in such manner as the President of the United States may direct. Under this part of the treaty, and in pursuance of the last clause of it, eleven sections of land were surveyed and located by the direction of the President, at the Grand Traverse of the Flint river, and one of said sections *assigned to each of the aforesaid reservees; section eight [*128] being resigned to Mokitchenoqua. There are two persons who claimed that name and the aforesaid section; both females, both of Indian descent, and both half-breeds;—their mothers being Indians, and their fathers white men. The complainants derive their title from one of these females, and Williams and Pritchette from the other; the former from Nancy Smith, the daughter of Jacob Smith, an Indian trader, and the latter from Elizabeth Lyons, who is also a defendant, the daughter of Archibald Lyons, another Indian trader. Such is the origin of the present suit. The complainants contend that Nancy Smith was the person intended by the treaty, and Williams and Pritchette that Elizabeth Lyons was that person. Before examining the evidence on this point, it is necessary to decide another point made by the complainants, viz: Whether it is competent for this Court, in the present suit, to decide which of these persons was meant by the treaty? It is contended the patent of March 7th, 1840, recognized Nancy

Smith as that person, and vested the title in her; and that this Court cannot go back of the patent. Now, there is nothing in the treaty authorizing the President, or any other officer of the government, to decide which of these two individuals, Nancy Smith or Elizabeth Lyons, is the true Mokitchenoque or person meant by the treaty. This question, (if necessary,) like all others, must be decided by the judicial tribunals of the country. It can be decided in no other way, as the treaty has not provided for its decision. Supposing it, therefore, to be true that the President, by issuing a patent to "Mokitchenoqua, (*alias* Nancy Crane, wife of Alexander D. Crane, formerly Nancy Smith,") has decided that Nancy Smith is the person meant by the treaty; and suppose it also to be true that no title to the land passed by the treaty, and that a patent [*129] *was necessary to transfer the legal title from the government to the reservees under the treaty; still, so long as the question has been raised, this Court is bound to decide it. For, if, on investigation, it should turn out that Elizabeth Lyons, and not Nancy Smith, was the person intended, the equitable title would be in Elizabeth Lyons or her grantees, notwithstanding the legal title might be in the complainants: and, that being the case, this Court would not decree the defendants to release such equitable title to the complainants, whose grantor had improperly and wrongfully obtained the legal title. The complainants must show a complete title in themselves, or a right to such title, before they can call upon the defendants to release. It is not enough that they show a legal title to the premises, if the defendants have the equitable title, unless they likewise show that they are in equity entitled to the equitable title also. I am of opinion the legal title to the land after it was located passed by the treaty, and not by the patent. The treaty, after reserving to Mokitchenoqua and the other reservees six hundred and forty acres of land each, says it shall "be located at and near the Grand Traverse of the Flint river, in such manner as the President of the United States may direct." It makes no mention of a patent, nor does it require the President or other officer of the government,

after the lands have been located, to do any act whatever recognizing the right of the several reservees to the different sections. All it required of the President was to have the lands located, at and near a particular place pointed out by the treaty. To locate does not mean to patent, but to have the several sections surveyed and marked out, and a map made of them, showing the particular section belonging to each of the reservees. This was done; and when it was done, this part of the treaty was fully executed on the part of *the government. [*130] Nothing further was required to carry it into effect, and the title then vested in the respective reservees, unless we hold the treaty itself to be clearly defective, in not providing for the execution of its several stipulations. A patent, although the usual, is by no means the only mode in which the title to the public domain can pass from the government to an individual. It may pass by an act of Congress, or by a treaty stipulation, as well as by a patent. The Indian title to the land reserved, did not pass to the United States by the treaty, which operated as a release, by both the Indians and government, of all interest either had in the lands reserved to the respective reservees, in fee simple; and it would be a violation of the treaty for the government to claim the land in question.

It is necessary, in the next place, to determine the nature and character of the evidence, by which the parties must establish their rights under the treaty. This is no easy task. The testimony is voluminous, and exceptions have been taken by one party or the other to nearly the whole of it, and the case itself is peculiar. I shall therefore not notice each particular exception, but proceed to lay down such rules as should, in my opinion, determine the kind of evidence to be received, and the circumstances under which it is admissible; holding, at the same time, such parts of the testimony taken as come within these rules, as competent evidence, and such parts as do not come within them, as incompetent.

I will first, however, dispose of a motion made at the hearing, to suppress the depositions of Than-en-dag-a-na and Charles H. Rood, for irregularity. The commissioner before

whom these witnesses were examined, after having taken the examination of a number of other witnesses, adjourned over to nine o'clock the next morning. At the [*131] *hour appointed, the commissioner and counsel of the complainants appeared, and waited until past ten o'clock for the defendants; when, neither the defendants nor their counsel or witness appearing to proceed with the examination, the complainants' counsel left, insisting that he was not bound to wait longer for the defendants. At eleven o'clock the defendants appeared, and took the depositions of the witnesses above stated, no one appearing for the complainants. An hour and a half, during which time neither the opposite party, counsel, nor witness appeared to proceed with the examination, was, I think, sufficient indulgence shown to the defaulting party. It would be oppressive, under such circumstances, to require one party to wait longer for the other. If the defendants, or their counsel, had been present, and the examination had been delayed by the non-attendance of a witness, the case would have been different. The defendants should have given notice anew of the examination of these witnesses, before taking their testimony. Their depositions must, therefore, be suppressed.

Hearsay evidence is admissible to show which of the two persons claiming under the treaty by the same name is the person intended. I cannot well see how the right of either can be established without the aid of this kind of evidence. The reservations were donations made by the Indians to the several reservees named in the treaty, and formed a part of the consideration received by them for the lands ceded to the government. They were not the donations of an individual, but of the Chippewa nation, or people, by a public act of theirs, which concerned alike the whole Chippewa nation. This case, then, comes within the exception of the general rule excluding hearsay evidence; which exception admits it on questions of public right, as to prove a custom, a right of common, public [*132] *boundaries, highways, and the like. 1 Stark. Ev., 60; 1 Phil. Ev., 248; Cow. and H. notes on Phil. Ev., vol. 2,

notes, 475 and 477; Greenleaf's Ev., 152. Hearsay evidence is admitted in such cases, because the public having an interest in the question, the right is supposed to have been a subject of frequent discussion with individuals, having the same inducements, and equal means to obtain correct information relating to it. It is admitted usually, though not always, from the necessity of the case, on questions touching ancient rights or pedigree. The right in controversy, it is true, is not an ancient right, the treaty having been made in 1819, a little more than twenty-three years ago; yet the same necessity exists for admitting this kind of evidence in this case, as in cases involving ancient rights, viz: the utter impossibility of proving by any other kind of evidence whether Nancy Smith, or Elizabeth Lyons, is the person for whom the reservation was made.

This kind of evidence, at best, is not very satisfactory, and must be admitted under certain restrictions and limitations. General hearsay, or public reputation, at the time of the treaty, among the Indians and others present at the treaty, and among the Indians since that time and before any controversy arose among the different claimants, is good evidence. So is evidence of what a person who is dead has said, who was present at the treaty, and would be likely, from that circumstance, to know for whom the reservation was made. *Rabory* v. *Hammond*, 2 Har. & Gill, 42, 52; Cow. & H. notes to Phil. Ev., vol. 2, p. 615, note 462; *Weeks* v. *Sparks*, 1 M. & S., 679, per LeBlanc, J., 688. The declarations of Jacob Smith and Archibald Lyons are admissible on this ground. General hearsay, or reputation is made up of the declarations of individuals; but, what a particular person has said, who was at the treaty, and who is still living, and might be used as a witness, should not *be received. The individual himself, should be [*133] made a witness, that the adverse party might have an opportunity to test the correctness of his information, by inquiring into its source, and the opportunities he had for obtaining it. But what a number of individuals have been heard to say on the subject, is evidence of general reputation; the weight to be given to such testimony, depending on the num-

bers, whether few or many, from whom the witness received his information.

What the witness has heard *post litem motam*, or since the dispute has arisen, (for that is what is meant, and not the commencement of the suit,) is not evidence. *The Berkley Peerage case*, 4 Camp. R. 401; *Richards* v. *Bassett*, 10 Barn. & Cres. R. 657; *Do dem. Tilmen* v. *Turver*, Ryan & Moody R. 141; *Monkton* v. *The Attorney General*, 2 Russ. & Myl. 160. It should appear that the declaration or information, came from a person who was likely to know the truth of what he stated, and who had no motive at the time to misrepresent it, or, in the language of Lord Eldon, in *Whitlocke* v. *Baker*, 13, Ves. R. 514, the declaration should be "the natural effusion of a party, who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth." To admit declarations made after a controversy had arisen, touching the subject matter, would open a door for the fabrication of testimony, and of imposition on the court, and in all probability would, in the long run, be productive of more evil than the rejection of hearsay evidence altogether. And to fix on the commencement of the suit, as the dividing line, would be little better than no rule; for it would still be in the power of a party, before suit brought, to corrupt the only medium through which the truth might be attained. No rule, except the one stated, will effectually guard against abuse.

[*134] *The *lis mota*, in the present suit, dates as far back as February 7th, 1827. No less than three persons, at different times, obtained certificates from the Register and Receiver of the land office at Detroit, identifying the applicant as the person intended by the treaty. The first was Elizabeth Lyons, who obtained her certificate August 2d, 1824. The next was Marie Lavoy, who obtained a certificate February 7th, 1827; and the last, Nancy Smith, alias Crane, who obtained her certificate, July 22d, 1831. There were then, as early as February 7th, 1827, if not before, two claimants to the land, under the treaty. The question, who is Mokitchenoqua? began to be

agitated. And in 1828, or 1829, according to the testimony of Antoine Champau, the chiefs held a council at Saginaw, to prove, as the witness states, before one Stanard, a justice of the peace, and in the presence of Archibald Lyons, that they had, at the treaty, given his daughter, Mokitchenoqua, a section of land at the Flint. This was within one or two years after Marie Lavoy had obtained her certificate; and it shows the solicitude Lyons felt for his daughter's claim, as well as the danger there would be in admitting declarations made since February 7th, 1827.

There is sufficient evidence, I think, that the Indian name of both Nancy Smith, and Elizabeth Lyons, was Mokitchenoqua, at, and previous to the making of the treaty. Neither of them was with the Indians at that time, nor has either been with them since. They had previously been taken from among them, when quite young, to be brought up with the whites. These circumstances, with the length of time that has since elapsed, sufficiently account for the evidence not being more full and explicit on this point. Under the rules stated, much of the testimony taken, must be rejected; and that, having a direct *bearing on the question, who was meant by Mo- [*135] kitchenoqua, in the treaty, I will now proceed to state.

First. On the part of the complainants.

Henry Connor, was interpreter at the treaty. Does not know that any reservation was made at the treaty for Elizabeth Lyons, but has heard it talked of since.

Robert A. Forsyth, was present at the treaty; was, at the time, in the Indian department; knows of reservations having been made at the treaty for certain children of Indian descent, and of a number of sections having been reserved for the children of Jacob Smith. Witness was private secretary to Governor Cass, who was the commissioner on the part of the government.

Jacob Smith handed to the commissioner the names of certain persons, for whom reservations were to be made; thinks the name of Mo-kitch-e-wee-no-qua was on the list. Saw but two lists of the names; Jacob Smith handed in one, and Henry Campau, or Louis Beaufait, the other. Witness copied the draft

of the treaty; does not remember having seen any other lists than the ones mentioned; does not know the number of names on the list handed in by Jacob Smith; does not recollect Smith handed in more than one list; does not recollect the other names, or the number of names on the list.

Louis Beaufait, acted as interpreter for the Indian department, at the treaty of Saginaw. Witness thinks Jacob Smith, a few months after the treaty, showed him a list of names, containing at least five in number; among them was the name of Mo-kitch-e-wee-no-qua;—said he had got a section of land for each;—that he had done pretty well at the treaty, or words to that effect;—that he had got five sections of land; but will not be positive that was the exact number.

Cecil Boyer, was at the treaty; was told by Jacob
[*136] Smith, *To-an-dag-e-nee, Kish-caw-ko, and by all the other chiefs, that a reservation had been made for Mo-kitch-e-wee-no-qua, daughter of Jacob Smith, at the Grand Traverse of the Flint river;—was told so while at the treaty. Asked the chiefs for whom reservations had been made, and they told her that she had one, and Mo-kitch-e-wee-no-qua had one, and a number of others had received one. Jacob Smith had no child of Indian descent, except Mo-kitch-e-wee-no-qua, to the knowledge of witness. Archibald Lyons had a child of Indian descent;—it was a girl;—does not know its Indian name, and has never heard it. Heard there was a section of land reserved for Lyons' daughter, at the treaty, at Shiawassee. She does not know of her own knowledge, there was a section reserved for Lyons' daughter at the treaty, but heard afterwards there was one granted to her at Shiawassee. She heard it from the Indians.

Macons, alias *Esh-ton-a-quot*, was at the treaty; knows Jacob Smith had a daughter named Mo-kitch-e-wee-no-qua, by an Indian woman, and that a reservation was made for her at the treaty. That the land reserved for her was situate at the crossing of the Flint river, and it was reserved there for no person else except Mo-kitch-e-wee-no-qua. Witness was at the treaty ground among the first, and knows said reservation was

made for Mo-kitch-e-wee-no-qua, and for no one else, from the fact that he was there. The last time he saw Mo-kitch-e-wee-no-qua, was at the treaty of Saginaw. He knows Archibald Lyons. Lyons came to the treaty ground two days after the treaty was ended. The treaty lasted ten days, and witness was present the whole time. There was one section reserved for Mo-kitch-e-wee-no-qua, and one for Mr. Boyer, which were all the lands reserved by the treaty, to his knowledge. Mo-kitch-e-wee-no-qua came to the *treaty with her uncle [*137] Now-we-tuck-que-to. Witness never saw her as he remembers before the treaty, and she was then about fifteen years old. Does not know the chiefs put in any claim for Lyons's daughter. Smith, at the treaty, claimed a section of land for his daughter Mo-kitch-e-wee-no-qua;—does not know he ever claimed it afterwards. Does not know Smith claimed more than one section of land for any of his children. Two sections were reserved for the Rileys.

Second. Testimony on the part of the defendants.

Rose Campau. Elizabeth Lyons was brought up in witness's family, and has lived with witness ever since she was a year old. Witness heard from the persons who attended the treaty from Detroit, on their return, and soon after, that a reservation had been made at the treaty for Elizabeth Lyons. Elizabeth's Indian uncles and other relatives, were frequently at witness's house, and they always called Elizabeth, Mokitchenoqua. Witness never heard the Indians claim any land before the Saginaw treaty, for Mokitchenoqua, or Elizabeth, but soon after the treaty, heard them say, that she, Mokitchenoqua, had land allotted to her at the treaty. It was a matter of general notoriety that a section of land had been reserved for Elizabeth Lyons, at the treaty.

Josette Knaggs. After the treaty of Saginaw, witness understood from the Indians, relatives of Elizabeth Lyons, that lands had been given to her at the treaty. This was a short time after the treaty;—about three or four months. Heard it also from Indians of her (Elizabeth's) tribe; heard Peter and James Riley say so. It was generally reported by those that

knew Elizabeth Lyons,—both among the whites and Indians,—that she had received a section of land at the treaty. Witness's husband, Whitmore Knaggs, on his return from the [*138] treaty, told her a section *of land had been given to Elizabeth Lyons. Whitmore Knaggs was Indian agent and interpreter at the treaty; he is now dead.

Joseph B. Campau, was not at the treaty. Elizabeth Lyons was brought up in his family. It was currently reported soon after the treaty, by those who were there, and others, that his little girl, as Elizabeth Lyons was then called, had had a section of land given to her at the treaty. Archibald Lyons, soon after the treaty, told witness so.

Rufus Stevens. Jacob Smith told witness section eight was reserved for Archibald Lyons's daughter. Has no recollection Smith said anything about a reservation for an Indian daughter of his, but he went on to state that section seven was reserved for Edward Campau, section eight for Archibald Lyons's daughter, and others for his (Smith's) children, and that they made no claim on the south side of the river; that his lands were on the north side of the river

Louis Moran. Smith, when inquired of by witness, who owned certain land at the Flint, said that it was a section of land that had been given to Archibald Lyons's daughter by the Indian treaty.

Antoine Campau, was at the treaty. Archibald Lyons's daughter had a section of land reserved to her at the treaty, as witness heard, either at the time of the treaty, or immediately after.

Louis Campau, was present at the treaty. Resided at Saginaw at the time;—was told at the time of the treaty by Elizabeth Lyons's grandfather, Ke-che-man-e-to, her father, and Captain Knaggs, the Indian agent, that her name was Mokitchenoqua. The cause of her being named Mokitchenoqua, as stated by Captain Knaggs, her father, and the chiefs, was, that they had gone to Governor Cass, and demanded that she [*139] should have a section of *land, and there was a section granted to her; but witness was not told where it was at

that time. Jacob Smith told witness, Lyons's daughter had a section of land reserved for her at Shiawassee, near the big rock;—that Lyons had made application for a section of land for his daughter, under the name of Mokitchenoqua, and that he had stolen his (Smith's) daughter's name.

John Bapt. Cochies was at the Saginaw treaty. To the question, "How did you know that Betsy, (Elizabeth,) Lyons had a reservation made at that treaty?" He says, he "heard her father, the chiefs, the interpreters, and a great many others present, say she had a section of land reserved at the Flint, at the time of the treaty."

John Bapt. Trudell, was present at the treaty. Lyon's daughter had land given to her at the treaty. All of the Indian chiefs told witness she had land given to her;—they told witness so at the time of the treaty. Smith, while he resided at the Flint, told witness Lyons's daughter had a section of land on the opposite side of the river;—he spoke of it a number of times, and but a short time before his death

As-sin-o-ka-man, was at the treaty. There was a section of land reserved for Wa-she-ba-ga's daughter, Mokitchenoqua. Wa-she-ba-ga applied to the chiefs for it, and they asked to have it reserved. He heard from the chiefs and others present, that it was located at the Grand Traverse. Wa-she-ba-ga was the Indian name of Archibald Lyons.

Peter Whitmore Knaggs was at the treaty;—was present when the Indians, in council, agreed to reserve a section of land for the daughter of Archibald Lyons, at the request of Lyons.

The evidence decidedly preponderates in favor of the defendants. The most important witnesses on the part of *the complainants, are Cecil Boyer, and Macons, *alias* [*140] Esh-ton-a-quot. The testimony of Macons I do not think entitled to much weight, when opposed by the evidence on the defense. He has evidently committed a number of gross blunders; and, although present at the treaty, he does not appear to have taken any part in it. He did not know Smith claimed more than one section of land, for any of his children,

or that more than four sections in all, were reserved at the treaty; one, as he says, for Smith's daughter, one for Mr. Boyer, and two for the Rileys. He says Smith's daughter was at the treaty; that she came there with her uncle, Now-we-tuck-que-to, when in fact, she was at the time in the State of Pennsylvania. He never saw her before, and has not seen her since, and says she was then about fifteen years old. She was in her tenth year only. He also says that Archibald Lyons was not at the treaty, and that he did not come to the treaty ground until two days after the treaty was over; while the evidence is conclusive that Lyons was at the treaty.

Cecil Boyer's testimony is deserving of more consideration. She was at the treaty, and was, as she says, told by Jacob Smith, To-an-dag-e-nee, Kish-caw-ko, and by all the other chiefs, that a reservation had been made for Mokitchenoqua, *daughter of Jacob Smith*. She asked the chiefs for whom reservations had been made, and they told her she had one, and Mokitchenoqua had one, and a number of others had received one. She at the time knew Smith had a daughter called Mokitchenoqua. She also knew Lyons had a daughter, but did not know her name. Now, it is possible the witness may be mistaken in saying the chiefs told her a reservation had been made for Mokitchenoqua, *daughter of Jacob Smith*. These last words may have been suggested by her own mind, and not used by the chiefs. She says she asked [*141] the chiefs, and *they told her she had one, and Mokitchenoque had one, and a number of others had one; and knowing that Smith had a daughter named Mokitchenoque, and not knowing any other person by that name, it was natural for the witness to suppose it was Smith's daughter that was meant. She could have drawn no other conclusion from the knowledge she previously possessed, and the information communicated. But she also heard there was a section reserved for Lyon's daughter at Shiawassee. Was not the same person and the same reservation referred to in both cases? I am inclined to that opinion. Smith told Louis Campau, Lyons had made application for a section of land for his daughter, by the name of Mokitcheno-

qua; and that he had stolen his, (Smith's,) daughter's name. He also said a reservation was made for her at Shiawassee. There were many reservations made by the treaty, to different persons, and at different places. The question of location was one of minor importance to the reservation itself, and it is not, therefore, at all surprising that there should have been different rumors as to the location, when there were none as to the reservees. The repeated declaration of Smith, after the treaty, that there was a section reserved at the Flint for Lyons's daughter, is almost conclusive of itself. He claimed five sections at that place, under the treaty, for himself, or children, and took possession of them; but he never claimed section eight. No one, perhaps, was more anxious to secure a personal advantage by the treaty, or knew better for whom reservations were made, than Smith himself.

While the bill, therefore, must be dismissed as to Williams and Pritchette, it is necessary to inquire what disposition must be made of it, as to the other defendants, against whom it has been taken as confessed. I think it should be dismissed as to them also. The complainants *have failed to show [*142] either legal or equitable title in themselves, which is necessary to entitle them to the relief they ask. The language of the act is, "any person having the possession and legal or equitable title to the lands." The object is not to fortify a bad title, or no title at all, by adjudications and releases, but to remove a cloud hanging over a good title, and casting a shade upon it. The defense made by Williams and Pritchette, enures to the other defendants. *Clason* v. *Morris*, 10. J. R. 524.

The bill must be dismissed as to all the defendants, with costs to Williams and Pritchette, but without costs to the other defendants.

[*143] *Wharton *v.* Fitch *et al.*

Where plaintiff's attorney instructed the sheriff not to levy on real estate, and, on the return of the execution unsatisfied, filed a judgment creditor's bill, and obtained an injunction, the injunction was dissolved on a plea of the defendant stating the instructions given to the officer, and that defendant offered to turn out real estate to be levied on, when called on by the officer with the execution.

Motion to dissolve an injunction which had been allowed on a judgment creditor's bill.

The motion was founded on a plea of the defendant, Fitch, on whose behalf it was made. The plea stated, among other things, that defendant was informed by the officer having the execution, and believed, that the plaintiff's attorney, at the time he delivered the execution to the officer, instructed him not to levy on real estate. That, when the officer called on defendant with the execution, defendant informed him he was seized in his own right, and in fee simple, of real estate within the bailiwick of the officer, subject to levy and sale, in value far exceeding the amount of the execution; and that he was willing it should be levied on, and offered to show it to the officer, and give him a description of it. That the officer declined to levy on it, and gave as a reason the aforesaid instructions given to him by the plaintiff's attorney. That defendant was, in fact, at that time, the owner in fee aimple of certain real estate, which he then described, stating the value of each particular piece or parcel, and whether it was incumbered or not, and the amount of the incumbrance. The plea also stated that defendant was still the owner in fee simple of all the said real estate, except one piece, (describing it,) which he had sold; and that such real estate was worth more than ten times the amount of
[*144] *the execution. The plea was verified in the usual form by the defendant, and also by the officer, so far as it related

to his acts and the instructions given to him by the complainant's attorney.

T. Romeyn, in support of the motion.

G. Miles, contra.

THE CHANCELLOR dissolved the injunction.

SILAS S. HART *v.* ELIJAH LINSDAY.

A writ of assistance will be granted to put the purchaser of mortgaged premises in possession, if the defendant, on being shown the Master's deed, and a certified copy of the order confirming the sale, under the seal of the Court, refuse to deliver possession.[1]

Mr. Backus moved for a writ of assistance to put the complainant in possession of mortgaged premises which had been purchased by him at the Master's sale. The motion was founded on an affidavit of David Hart, stating that, on the twenty-fourth day of March, he went to the residence of the defendant, on the mortgaged premises, and exhibited to him the Master's deed, and a certified copy of the order confirming the Master's report of sale, under the seal of the Court, and, as complainant's agent, demanded possession; which defendant refused to give.

THE CHANCELLOR granted the motion.

[1] See Benhard *v.* Darrow, *post*, 519 and note.

[*145] *In the Matter of the Petition of Josiah R. Dorr, Guardian of George J. Dorr, a Minor.

A petition under the "Act to authorize the conveyance of real estate of minors in certain cases," approved February 28th, 1840, should set forth fully all the facts and circumstances rendering a sale, or other disposition of the minor's property, necessary; that the Court may judge of the necessity and fitness of the measure.[1]

A guardian should not make an absolute sale of the real estate of his ward, and then apply to the Court to authorize him to do what he has already bound himself to do; and the Court will not ratify such agreements. The proper course is to obtain leave of the Court in the first instance.

Petition under the act entitled "An act to authorize the conveyance of real estate of minors in certain cases," approved February 28th, 1840.

The petition stated that Melvin Dorr died in 1838, leaving a widow, Marion Dorr, and two children, Mary L. Dorr, by the said Marion, and George J. Dorr, by a former wife, ward of the petitioner; and that, afterwards, the said Mary L. Dorr departed this life. That, after the decease of the said Mary L., the widow married Samuel B. Scott, and set up a claim to a distributive share in the supposed estate of the said Mary L., and also her claim to dower in the estate of Melvin Dorr, she having rejected the provision made for her by the will of the said Melvin Dorr. That, after consulting and advising with the executor, and with counsel, as to the course to be pursued to protect the rights and interest of his ward, petitioner, September 8th, 1840, entered into an agreement with the said Samuel B. Scott, and Marion his wife, that the said George J. Dorr should, on coming of age or when authorized by a special act of the legislature, convey to said Marion certain real estate described in the agreement; a copy of

[*146] *which was annexed to the petition, and made a part of it. And that, in consideration thereof, the said Samuel

[1] See Nichols *v.* Lee, 10 Mich. 526; Ryder *v.* Flanders, 30 id., 336.

B. and Marion, had released all her right of dower in the estate of said Melvin Dorr, and all claim upon any supposed estate of the said Mary L. The petition further stated that the said George J. Dorr was of the age of eighteen years; and that the said Samuel B. and Marion were anxious to obtain a legal title to the land agreed to be conveyed to them by petitioner, and that the arrangement was a favorable one for the ward, and would, when completed, release the estate from embarrassment.

There was attached to the petition a copy of an indenture, bearing date September 8th, 1840, between the guardian of the one part, and the said Samuel B. and Marion of the other, by which the guardian granted, bargained, and sold, some six hundred acres of land to the said Marion, and covenanted that his ward should convey, as stated in the petition; and the said Samuel B. and Marion, in consideration thereof, granted, bargained, and conveyed to the ward, all the right, title, interest, dower, claim and demand of the said Marion, in and to the estate, real and personal, of the said Melvin Dorr, deceased, either in her own right of dower, or as heir, and in right, of her late child, Mary L. Dorr, deceased, one of the heirs at law of the said Melvin Dorr, deceased.

Joy & Porter, for petitioner.

The Chancellor. The second section of the act, under which the petition is presented, is in these words: "Whenever it shall appear satisfactory to the Court of Chancery, that a disposition of any part of the real estate of an infant, or of his interest in any term for years, is necessary and proper, either for the support and maintenance of such infant, or for his education, or that the interest* of said infant requires, or will be substantially [*147] promoted by such disposition, on account of any part of his said property being exposed to waste or dilapidation, or on account of its being wholly unproductive, or for any other peculiar reasons or circumstances, the Court may order the

letting for a term of years, or decree the sale, conveyance, or other disposition of such real estate or interest, to be made by the infant, or the guardian or guardians appointed by said Court for such infant, in such manner, and with such restrictions as shall be deemed expedient." Laws 1840, p. 26.

The language of the statute is very broad, particularly that part of it which says, "or for any other peculiar reasons or circumstances." It is none too broad, however, so long as the power of the Court is used with proper discretion. Other cases than those particularly named might occur, in which it would, clearly, be for the interest of the minor to part with a portion of his estate. Where his title is doubtful, a compromise might, under certain circumstances, be more for his interest than to run the hazard of litigation, with the expense attending it. Something of this kind seems to have been the object of the petitioner, in making the agreement with Mr. and Mrs. Scott. But, before the Court will authorize a sale, or other disposition, to be made of a minor's estate, it must be satisfied, from the facts before it, of the necessity and propriety of the measure. It must see that the interest of the minor requires it; and all the facts and circumstances, rendering it necessary, should be fully stated in the petition. In this the petition is clearly defective. It does not show of what estate Melvin Dorr died seized, or what disposition was made of it by his will, or what interest his infant daughter took under the will. Nor does it state on what grounds the widow, after the death of her daugh-
[*148] ter, Mary L. Dorr, *claimed her portion under the will. The Court cannot judge of the benefits that would be likely to result to the minor from the agreement, or the necessity there was for making it, until it is put in possession of these facts.

There is another objection to granting the prayer of the petitioner. It is this: He, in effect, asks the Court to ratify an agreement entered into by him two years and a half ago. He does not ask for an order authorizing him to sell his ward's estate, or to transfer a part of it to perfect an undisputed title to the balance; but that the Court will enable him to perform

his agreement with Mr. and Mrs. Scott, made in September, 1840. He should have sought the aid of the Court before he concluded the agreement. The precedent would be a bad one. Should it be once established, it is to be feared that guardians might be induced by it to make improvident sales of the real estate of their wards, with the expectation that their acts would be confirmed by this Court. Besides, a guardian thus situated would not stand in the most favorable position to represent the interest of the minor; he might be prompted more by his own interest, than a desire to benefit his ward.

Prayer of petition denied.

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*Olmsted Chamberlin *v.* Daniel Darragh, Cornelius Darragh *et al.* [*149]

Equity will not decree the specific execution of a written contract for the sale of land made by a special agent, who has exceeded his authority.[1]

Neither will it require the agent to convey his equitable interest in the land as *cestui que trust*, he having acted only as the agent of the trustee in selling the land, although the contract on its face, does not disclose the agency; the bill charging that the contract was made by him as the agent of the trustee, and not that it was made by him in his own right.

Bill for the specific performance of a contract for the sale of land. The facts of the case appear in the opinion of the Court.

M. L. Drake, C. Draper and Wm. P. Draper, for complainant.

O. D. Richardson and J. B. Hunt, for defendants.

[1] Absence of proof of written authority to an agent to execute a land contract is unimportant where the contract has been fully ratified by both parties by demand and receipt of payment, and by possession and improvement. Hanchett *v.* McQueen, 32 Mich., 22.

The Chancellor. The bill in this case is filed for the specific performance of a contract entered into between the complainant and Daniel Darragh, one of the defendants, October 26th, 1838. The contract is in these words:

"Whereas, I, Daniel Darragh, have this day sold to O. Chamberlin, the following described lands in the village of Pontiac, viz: Out-lots numbered 16, 17 and 20, in the south-east quarter of section 32, and out-lots numbered 11 and 13, on the southwest quarter of section 28, township 3 north, of range 10, east, being lands bought by the late Archibald Darragh, of the Pontiac company, for the sum of nine hundred dollars, to be paid as follows: two hundred dollars down, or when the deed is delivered, the balance in three equal [*150] annual installments, with interest, to *be secured by a mortgage on the same, by said Chamberlin; and I, the said Chamberlin, do bind myself to comply with, and fulfill the above contract. Dated, Pontiac, 26th October, 1838."

(Signed,) "D. Darragh,
"Olmsted Chamberlin."

The bill states that the several lots named in the contract were conveyed by the Pontiac company, in 1832, to Archibald Darragh, who died seized in 1836, leaving a last will and testament, and Cornelius Darragh sole executor thereof, with authority to sell and dispose of the real estate, and divide the proceeds, after paying the debts, of the testator, between Daniel Darragh and Margaret Baird; one-half to Daniel Darragh, his heirs and assigns, and the other half to Margaret Baird, for, and during her natural life, and, after her death, to Daniel Darragh, his heirs and assigns. And, that Daniel Darragh made the aforesaid contract with complainant, by virtue of a power of attorney, from the executor and Mrs. Baird, to sell the land. Daniel Darragh, by his answer, admits the making of the contract, but denies he had any authority from the executor and Mrs. Baird to sell the land. He admits he was authorized by the executor to make a contract for the sale of the land, subject to his approval, and says he so informed complainant at the

time the contract was made. Cornelius Darragh, the executor, admits he authorized Daniel Darragh, to bargain for a sale of the land, but says that the written power he gave him, reserved to himself the right to confirm or reject the sale, as he should think best; and that, on being informed of the contract made with complainant, he refused to ratify it.

The power under which Daniel Darragh acted, is not produced. The executor states that it is either lost or mislaid.* Daniel Darragh says it was destroyed on his [*151] turn to Pittsburgh, where the executor lives. The written agreement does not refer to it, nor is the agreement signed by Daniel as agent or attorney for the executor. The bill, however, shows that the complainant treated with him throughout, as the agent of the executor; and the contract must be viewed in that light, and the same as if it referred to the written power, and were signed by Daniel Darragh as the agent or attorney of the executor. This makes it necessary to inquire into the extent of the agent's authority. Now, both Cornelius and Daniel Darragh state in positive terms, that it authorized the latter to make a conditional sale only, subject to the approval of the executor, and not an absolute sale. Their answers on this point, are responsive to the bill, and there is no evidence disproving them. The Court must, therefore, take it for granted such was the nature of the power under which the contract was made, and, that being the case, the complainant is not entitled to a decree for a specific performance, the executor never having given his assent to the contract. Daniel Darragh was a special agent, and nothing more. He was only authorized to make a contract for the sale of the land, subject to the approval of his principal; and no rule of law is better settled than that a particular or special agent cannot bind his principal when he exceeds his authority. *Attwood* v. *Munning*, 7 Barn. & Cres., 278; *Penn* v. *Harrison*, 3 T. R., 757; 1 Pet. R., 264. Every contract for the sale of land is void, unless reduced to writing, and signed by the party, or some person by him duly *authorized in writing*. R. S., 329, § 8. A person purchasing real estate of an agent, should call on him for his written authority

to sell. This was unnecessary in the present case, for it [*152] appears from the testimony that the *authority was produced when the contract was signed, but that complainant did not look into it or examine it.

It is said that, if the executor is not bound by the contract, still Daniel Darragh should be required to convey his equitable interest in the premises under the will of Archibald Darragh. I cannot think so. The contract was for the purchase of the legal estate, or land itself, of the executor, and not the interest of Daniel Darragh, as *cestui que trust*, under the will. It would be making a new contract for the parties, instead of decreeing the execution of one made by themselves. There is no analogy between this case, and that class of cases where the complainant may, if he choose, have a conveyance of such part of the premises as the defendant can make a good title to, his title failing as to a part.

Bill dismissed with costs.

[*153] *Sawyer *et al. v.* Studley *et al.*

It is the termination of the suit which entitles one party to costs against the other, and the law then in existence, is the rule by which they are to be ascertained. A different rule prevails between attorney and client.[1]

Affidavits are required in certain cases, before taxation of costs.

Petition for re-taxation of costs.

E. S. Lee, for the petition.

H. H. Emmons, contra.

The Chancellor. This case was decided in January last, and by the decree of the Court, costs were adjudged to the defendants. The solicitor's services were rendered in part, after

[1] See Comp. Laws, 1871, §§ 7385, 7386.

the law of 1840, regulating fees, was passed, Laws 1840, p. 175, and before the repeal of that part of the revised statutes relating to the same subject, in 1841. Laws 1841, p. 10. These services were charged in the bill of costs, and allowed on taxation, at the rates fixed for such services by the revised statutes. In this the taxing master erred. It is the termination of the suit that entitles one party to recover costs against the other, and, consequently, the law then in existence, is the rule by which they are to be ascertained. *The People* v. *Herkimer Common Pleas*, 4 Wend. R., 210; *Smith* v. *Castlers*, 5 Wend. R., 81; *Dean* v. *Gridley*, 11 Wend. R. 167. A different rule prevails between attorney and client.

By the laws of 1840, solicitors are entitled to $20 in all cases, on final hearing, and in all cases of hearing, other than on final hearing, to $10; but once, however, in each case. Every hearing by which a cause is finally disposed *of, [*154] is a final hearing; and the solicitor is entitled to $20, and no more, unless there has been a previous hearing upon a demurrer, or plea, or pleadings and proofs without a final disposition of the cause; in which case he is entitled to $10 for such hearing, in addition to the $20.

The revised statutes, p. 549, § 35, provide, where there are charges in a bill of costs for the attendance of any witnesses, or for copies or exemplifications of documents or papers, or for any other disbursements, except to officers for services rendered, that such charges for witnesses shall not be taxed, without an affidavit stating the distance they respectively traveled, and the days they actually attended; and such charges for copies shall not be taxed, without an affidavit that such copies were actually and necessarily used, or were necessarily obtained for use; nor shall such disbursements be allowed without an affidavit specifying the items thereof particularly, nor unless they appear to have been necessary, and reasonable in amount. This chapter of the revised statutes is still in force, and not repealed by the act of 1841.

Let an order be entered for a re-taxation of the bill of costs, by the taxing master, on the principles above stated.

[*155] *The La Plaisance Bay Harbor Company *v.* The Council of the City of Monroe *et al.*

The ordinance of 1787, for the government of the Territory of the United States northwest of the River Ohio, is no part of the fundamental law of the State, since its admission into the Union. It was then superseded by the State Constitution; and such parts of it as are not to be found in the Federal or State Constitution, were then annulled by mutual consent.

That ordinance was enacted before the Constitution of the United States, with a view to existing circumstances; and was intended to operate between the confederacy and the territory, as the articles of confederation did between the States. In construing it, the articles of confederation, and not the Federal Constitution, must be looked at.

Navigable waters are public highways at common law; and the only object of the clause in the ordinance of 1787, relating thereto, was, to secure to citizens of the Confederated States such rights, in relation to those waters within the territory northwest of the Ohio, as were already possessed by the inhabitants of that territory; and to prevent any tax or duty on persons navigating them.[1]

By the "permanent constitution and State government," mentioned in the ordinance, is to be understood the establishment of a new government, as a substitute for the territorial one, and a constitution instead of the ordinance; and this substitution was to be not for part, but for the whole of each.

There is nothing in the ordinance prohibiting the State from improving its navigable waters.

Where complainants were authorized by their charter to erect works, &c., and improve the harbor of La Plaisance bay, *held*, that the diversion of a river, at a point some distance above its mouth, in the bed of which they had no title, which flowed into said bay, and caused a channel to be kept open through it, created no damage for which they were entitled to compensation.

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[1] See Moore *v.* Sanborne, 2 Mich., 519.

As to what are navigable streams, see Moore *v.* Sanborne, *supra;* Tyler *v.* The People, 8 Mich., 320; Lorman *v.* Benson, 8 id., 18; Attorney General *v.* Evart Booming Co., 34 id., 462.

As to what is necessary to render a stream a public highway. See Moore *v.* Sanborne, *supra;* Thunder Bay Co. *v.* Speechly, 31 id., 336; Grand Rapids Booming Co. *v.* Jarvis, 30 id., 308.

The beds of all meandered streams and navigable waters, belong to the State within which they lie; and the riparian proprietor has no right to the land covered, without express grant.[1]

Public grants are to be construed strictly, and nothing passes under them by implication.[2]

*This was a motion to dissolve an injunction, for [*156] want of equity in the bill.

The bill states that the complainants, by an act of the legislature of the Territory of Michigan, approved April 25th, 1825, were constituted a body politic and corporate, for the purpose of improving the harbor of La Plaisance bay, on the border of Lake Erie, in the county of Monroe, and erecting piers, wharves, warehouses, and other necessary buildings and improvements in and about said bay, for commercial purposes, and to purchase and hold such real and personal estate as should be necessary for the purposes of their creation; and that they have gone into operation, and continued their corporate succession regularly, down to the time of filing the bill of complaint. That, soon after their organization, complainants proceeded to erect a warehouse on a pier in said bay, on the margin of the channel of a branch of the River Raisin, which runs into said bay; and, finding it necessary for the convenience of vessel-loading and unloading, to connect their warehouse and wharf with the shore, and the southwest shore of the bay being the nearest available point, they created, at great expense, a bridge or wharf extending to the shore, the space between their selected location and the shore being an extent of shallow water and marsh, unfit for their purposes, and which could not be reached by vessels carrying on the commerce of Lake Erie. That their object in selecting their location was to command the nearest possible approach to the city (then village) of Mon-

[1] Overruled as to this point by Lorman *v.* Benson, 8 Mich., 18. See, also, Attorney General *v.* Evart Booming Co., 34 Mich., 462; Ryan *v.* Brown, 18 id., 196; Rice *v.* Ruddiman, 10 Mich., 125; Clark *v.* Campau, 19 id., 325; Watson *v.* Peters, 26 id., 508; Bay City Gas Light Co. *v.* Industrial Works, 28 id., 182.

[2] See Ballou *v.* O'Brien, 20 Mich., 304; Johnson *v.* Ballou, 28 id., 384; Stockton *v.* Williams, *ante.*, 120.

roe, and that the current of the River Raisin, running through said bay, and by their warehouses, caused a sufficient depth of water to ensure access to most of the vessels and other craft navigating the lakes; that no sufficient depth of water could be obtained, unless the current which runs [*157] by their works, (and which is caused by the *principal branch of the River Raisin running into said bay,) were kept clear and unobstructed; that, when its discharge and flow are unobstructed, this result is obtained, except at uncommonly low stages of water in Lake Erie, and a depth of water obtained in the channel averaging from six to nine or ten feet, or more. That, about the twenty-fifth day of December, 1825, they purchased a piece of land on the southwest side of the bay for the purpose of making the connection above mentioned between their warehouse and wharf, on the margin of the channel and the shore, and then accomplished the connection by building the before mentioned bridge or way, on piles extending about twelve hundred feet, at an expense of several thousands of dollars. That, for six years past, they have been in the peaceable possession and enjoyment of the property, and their works have been for a long time the principal and almost only point of communication for the lake commerce with the city of Monroe and the adjacent country, and have been a source of considerable profit to themselves. That the availability of their works, and the sufficiency of the channel aforesaid for navigation, depends upon the unobstructed flow of the waters of the river, and that the channel will hereafter, as heretofore it has done, continue to be a safe and commodious passage for steamboats and vessels to and by said wharf, unless the branches emptying into La Plaisance bay are stopped, or the water is in any way diverted; that, if such stoppage or diversion is permitted, the channel will become obstructed by alluvial deposits, which the current is now strong enough to carry away, and the works of complainants will be rendered worthless.

That the River Raisin and La Plaisance bay are connected with the St. Lawrence river, by means of Lake Erie; that

they are within the country formerly called the *North- [*158] west Territory, and subject to the ordinance of July 13th, 1787, entitled "An ordinance for the government of the Territory of the United States northwest of the River Ohio;" that, among certain articles of compact therein contained, is one declaring that "the navigable waters leading to the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other State that may be admitted into the confederacy, without any tax, impost, or duty therefor." That, by an act of congress providing for the sale of the public lands in the territory northwest of the Ohio, passed May 18th, 1798, this article was recognized and affirmed; and that, in making the United States surveys, the said river and its branches have never been included in any survey, sale, or grant, but have been left free and unincumbered. That complainants are entitled to have it remain so, and that they are citizens of the United States.

The bill further shows that by an act of the legislature of the State of Michigan, entitled "an act to amend an act entitled 'an act to incorporate the city of Monroe,' approved March 22d, 1837," approved April 6th, 1838, the common council of the said city of Monroe, were authorized and empowered to finish and complete the canal and piers already commenced by the United States government, connecting the waters of the River Raisin with Lake Erie, together with proper piers and basins for said canal within the limits of said city, and to improve the navigation of the said river within the limits of said city, by cutting through the bends of the river. The act further provided for the election of canal commissioners, &c. That the common council of Monroe, and the canal commissioners having contracted with Harvey W. Campbell and *George W. Strong for that purpose, are proceeding [*159] under color of said act to excavate a canal from the River Raisin to Lake Erie, and are driving piles in some places in the bed of the river, causing an obstruction to the current,

and by these and other things diverting and impeding the channel of the river, and causing it gradually to become filled up. That they have commenced and are proceeding with a dam in the river above complainants' works, which will entirely cut off the water flowing from the river into the bay, and destroy the usefulness of complainants' buildings and improvements. That the individuals engaged in the operations are irresponsible, and complainants, if left to their remedy against them, will be compelled by the necessity of a multiplicity of suits, &c., to lose most of their property without compensation. That the excavations, piers, canal, &c., will create a public nuisance.

Prays that defendants may be restrained from proceeding further, and may be compelled to remove the obstructions and works they have already finished or commenced, and which will in any manner impede the free and unobstructed flow of the channel by complainants' works, and for such other or further relief as the Court shall see fit to grant.

The defendants moved to dissolve the injunction which had been granted on the filing of the bill.

T. Romeyn, in support of the motion.

I. The Court of Chancery has no jurisdiction in the premises. There is no equity in the bill.

First. The acts complained of, are not in contravention of the ordinance of 1787, for the government of the territory northwest of the River Ohio.

1. The ordinance was not designed to deprive the States which might be formed in the Northwest Territory of [*160] any *control over their navigable waters, which the original states could exercise over navigable waters within *their* limits.

2. Even if this were not so, yet the acts complained of are intended and adapted to *improve* the navigation of the river, and, therefore, are not within the supposed inhibitions of the ordinance. Of their expediency, the legislature, and not the Court, must judge.

Second. The acts complained of, are not in contravention of the article in the constitution, which inhibits the taking of private property for public use, without compensation.

II. Even if the Court has jurisdiction, the injunction should be dissolved.

1. The damage to the complainants, is only in anticipation, and it is not certain whether it will ever be felt.

2. The acts complained of, not being of *themselves* nuisances, there should have been an issue to a jury, to ascertain whether, *in their circumstances and results*, they involved a nuisance.

3. The damage to the defendants, from the delay of their works, will be great and immediate; the damage of the complainants is remote and doubtful. Under these circumstances, a preliminary injunction should not have been granted. Having been granted, it should be dissolved.

4. The injunction should not have been granted without security for damages.

D. Goodwin and H. T. Backus, contra.

H. T. Backus.

I. Has this Court jurisdiction of the subject matter?

It is a well established branch of equity jurisdiction, to prevent the creation of a public nuisance, which also tends to the destruction of private property; and this Court [*161] has undoubted right to interfere by injunction, where either private individuals, on their own responsibility, or persons in an official or *quasi* official position, purporting to act under a statute, are doing unwarrantable acts, to the injury and destruction of the rights of others.

II. The case made by the bill entitles the complainants to the relief sought.

1. By the organization of the La Plaisance bay harbor company, their rights under their charter have become vested, and cannot be taken away. As a corporation they possess all the powers conferred by the act, and all implied powers necessary

to effect the object of their creation; and their implied rights are equally inviolable with their express powers.

2. The River Raisin, which defendants seek to dam and divert, is one of the rivers and water courses embraced in the ordinance of 1787, and their acts are in violation of the provisions of that ordinance, respecting such waters.

3. A vested and well defined interest in the use of water, whether navigable or otherwise, may exist as well as an interest in any other species of property.

4. Neither the State, nor the city of Monroe, can destroy the property of individuals, except upon the constitutional terms of giving adequate compensation.

5. The act of the legislature under which defendants are proceeding, authorizes no such acts as are complained of. No act will be construed to have an effect so manifestly subversive of private rights, unless expressed in the most unequivocal terms.

The Chancellor. The motion is opposed, principally, on two grounds:

First. That the act amending the charter of the city [*162] *of Monroe, so far as it relates to the improvement of the navigation of the River Raisin, in the manner stated, is in contravention of the ordinance of 1787, for the government of the territory of the United States, northwest of the River Ohio; the ordinance providing that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor. Art. 4.

Second. That no provision is made by the act for compensating complainants, or others, who might be injured by the improvement, in pursuance of the State constitution, which says, "The property of no person shall de taken for public use, without just compensation therefor." Art. 1, § 19.

It was also urged, as a reason why the injunction should not be dissolved, that the act of the legislature does not authorize a dam across the river. It is true the act says nothing about a dam, but it authorizes the defendants to finish and complete the canal and piers heretofore commenced by the United States; and it is nowhere stated in the bill, that the dam is not a part of the improvement originally contemplated. But whether that be so or not, is immaterial. The object intended, is the improvement of the navigation of the river; and, to that end, the act authorizes the turning of it, at certain points, from its natural bed into new channels, where it might be made better to subserve the ends of commerce. The erection of the dam, for this purpose, is clearly within the act. It is not necessary that the power should be expressly given; it may be implied from the nature of the grant. It would *be useless to form a new bed for the river, if the power to turn the water into it was withheld. [*163]

The injunction must, therefore be dissolved, unless it can be sustained on one or the other of the grounds above stated.

The ordinance of 1787, in my opinion, is no part of the fundamental law of the state since its admission into the Union. It was then superseded by the state constitution, and such parts of it as are not to be found in either the federal or state constitutions, were then annulled, by mutual consent.

The articles of confederation between the thirteen original states, were entered into July 9th, 1778, and were afterwards superseded by the constitution of the United States, in March, 1789. The ordinance was passed July 13th, 1787,—one year and eight months before the constitution took effect, and two months before it came from the hands of the convention that formed it. The ordinance must, consequently, have been drawn with a view to the then existing government under the articles of confederation. If the constitution had been in operation at that time, it can hardly be supposed that the ordinance would have been what it is; for a new, and, in most respects, entirely different state of things exists under the constitution, from what existed under the articles of confederation. To understand,

therefore, the ordinance, and the different objects had in view by it, we must look to the articles of confederation, and not to the constitution of the United States.

Most of the ordinance was subject to change or alteration, by congress, or the territorial legislature. Of this character is the whole ordinance, except the last two sections; one of which, (the last section,) contains six articles of compact be-
[*164] tween the original states and the people and *states in the territory, which were to remain unalterable, unless by common consent.

These articles appear to have had several objects in view. *First.* To supply the place of a constitution, until the new states to grow up in the territory should be admitted to all the rights of the confederacy. Without something of this kind, the property and personal liberty of the inhabitants of the territory would have been subject to the caprice or whim of the local legislature. *Second.* To make the territory a part of the confederacy, with certain rights, before the new states were organized; and not a mere dependency of the confederacy, without any rights of its own. The confederation was a compact between sovereign states. It was obligatory upon, and secured the rights of, the states that were parties to it, but it went no further; and, when the territory northwest of the Ohio ceased to be a component part of any one of these states, it would, at the same time, have ceased to be a part of the confederacy, and to be subject to the articles of confederation, but for the ordinance. Between the confederacy and territory, the ordinance was what the articles of confederation were between the original thirteen states,—a bond of union, and a guaranty of the rights of the citizens of each within the territorial limits of the others. Hence, by the fourth article of the ordinance, the territory and states to be formed therein were to remain a part of the confederacy, subject to the articles of confederation, and the acts and ordinances of congress,—to pay a part of the federal debt and expenses of the federal government, and for that purpose to levy taxes; not to interfere with the primary disposal

of the soil by the United States, and to impose no taxes on lands belonging to the United States.

The same article further provides that non-resident *proprietors shall not be taxed higher than residents; and [*165] "that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other state that may be admitted into the confederacy, without any tax, impost, or duty therefor." All navigable rivers, by the common law, which law was guarantied to the citizens of the territory by the ordinance, are public highways. The clause in question was not necessary to secure these rights, and it would not therefore, perhaps, be a forced construction of it, to say that it was intended to secure within the territory, to the citizens of the states, what was already secured to them in the states by the fourth article of confederation, which says, "the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof, respectively." The articles of confederation dealt with states only. Besides, the drift of the whole seems to be to guard against the imposition of any *tax*, *impost*, or *duty*, on persons traveling or trading upon the rivers of the territory, which, at that early day, must have been its principal, if not only highways.

Third. The principal and great object of the ordinance was, to secure to the states, to be formed within the territory, admission into the Union on an equal footing with the original states, and with constitutions, and forms of government, based upon the great fundamental principles of civil and religious liberty contained in the ordinance itself; except so far as they might be departed from, or changed, with the assent of both parties. The articles of *confederation provided [166*] for the admission of no state, except Canada, without the assent of nine of the thirteen states. Art. II. Now, each of the

states of the northwest territory was, by the ordinance, to be admitted into the Union, on an equal footing with the original states, in all respects whatever, when it should have sixty thousand free inhabitants. It was also to be at liberty "to form a permanent constitution and state government: Provided, the *constitution and government*, so to be formed, shall be republican, and *in conformity to the principles contained in these articles*." By permanent constitution and government, I understand a new government, that is to take the place of the territorial government and a constitution that is to take the place of the ordinance. That the one is to be substituted for the other, not in part, but in the whole.

Such appears to have been the construction given to the ordinance, by congress, on the admission of the state. It was made one of the conditions of her admission that she should not interfere with the sale, by the United States, of the vacant and unsold lands within her limits, and that she should not tax them. R. S. 30. The same condition was also attached to the grant, made by congress, of public lands to the state, with a further condition, that the state should not tax the lands of non-resident proprietors higher than those of residents. Laws 1836, p. 59. The ordinance contains like limitations of the power of the local legislatures, but there was nothing of the kind in the state constitution.

The thirteenth section of the ordinance, which is in the nature of a preamble to the following section containing the articles of compact, declares the different objects had in view by them. One of those objects is stated in these words: "to fix and establish those principles as the basis of all laws, *con-*
[*167] *stitutions and governments*, which forever *hereafter shall be formed in the said territory." That is, to determine the different political elements that should enter into, and form, the constitutions and governments of the states which should grow up in the territory, unless waived by common consent. Everything, therefore, contained in the ordinance, and not carried into the state constitution, was annulled by common consent, on the admission of Michigan into the Union.

Whether correct or not, on this point, is immaterial in the present case. There is nothing in the ordinance prohibiting the state from improving the navigation of its rivers. *Spooner* v. *McConnell*, 1 McLean R., 337; *Hutchinson* v. *Thompson*, 9 Ohio R., 52. The mode of improvement is to be determined by the legislature, and not by the Court. But the state, or those authorized by it, cannot take private property for that purpose, without first making compensation. The state constitution says: "The property of no person shall be taken for public use, without just compensation therefor." Art. 1, § 19. This brings us to the all important question,—the rights of complainants in the water of the River Raisin.

Have the complainants a right to the flow of the water in the Raisin, in its natural bed? They do not own the bed of the stream, or the land on either side of it. Their warehouse and wharf are not on the bank of the river, but in La Plaisance bay, which forms no part of the river, but is a part of the shore of Lake Erie. The river empties into the bay, or, rather, into what may be called a neck of the bay, about a mile and a half north of the wharf. This neck extends, in a southerly direction, about half or three-quarters of a mile, and the whole bay, with this exception, is a part of the lake shore. This is not a case, then, in which the defendants are about to divert a stream that has been wont to flow through complainants' *land. The [*168] complainants do not own either the bed, or the banks, of the river, below the point of obstruction. The bed of the stream is public property, and belongs to the state. This is the case with all meandered streams, no part of them being included in the original survey; and the common law doctrine of *usque ad filum aquæ* is not applicable to them. The public owns the bed of this class of rivers, and is not limited in its right to an easement, or right of way only. So, with regard to our large lakes, or such parts of them as lie within the limits of the state. The proprietor of the adjacent shore has no property whatever in the land covered by the water of the lake. The land under complainants' warehouse and wharf belongs to the state. We

must look then, for complainants' rights, to their charter, and to that alone.

If their charter does not give them the right for which they contend, they have no such right; and the damage they may sustain, if any, will be *damnum absque injuria*. It will be one of those remote consequential damages, which a greater or less number of individuals sustain by every public improvement. Every diversion of trade into new channels, is an injury to those who were previously in receipt of its profits. But this is an injury for which the law makes no compensation; for if it did, there would be an end to everything like improvement. Should the improvement of the defendants take away all business from complainants' wharf, it would be the misfortune of the latter, but the defendants would be under no legal or moral obligation to make remuneration. So, if, in consequence of the diversion of the river, the channel in front of their wharf should be filled up by the action of the winds and waves; unless they have a right under their charter to the flow of the river in its natural channel.

[*169] *Raisin, or the current, or channel formed in the bay by the water discharged at its mouth; nor is there, in any part of the charter, the most distant allusion made to either. John Anderson and seven other individuals named in the act, and such other persons as had associated, or should associate with them, were incorporated "for the purpose of improving the harbor at La Plaisance bay, on the border of Lake Erie, in the county of Monroe, and erecting piers, wharves, warehouses, and other necessary buildings and improvements, in and about said bay, for commercial purposes." This is the whole extent of the grant made to complainants. The right contended for is not given in express terms, and, if it exists, must be implied. I can see nothing in the charter from which it can be implied. No one, from reading the charter, would dream of it. But it is unnecessary to pursue this branch of the case further; for all public grants are to be construed strictly, and nothing passes under them by implication. *Charles River Bridge* v. *Warren*

Bridge, 11 Pet. R. 544. *Staurbridge Canal* v. *Wheeley*, 2 Barn. & Adol. 792.

Injunction dissolved with costs.

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*John E. Schwarz *et al. v.* Nathan Sears [*170] *et al.*

The Court of Chancery will not prevent a mortgagee from taking possession of mortgaged premises, or, if he is in possession, deprive him of it, so long as there is anything due on the mortgage.[1]

If a mortgagor wishes to test the validity of a statutory foreclosure in this Court, he must file a bill to redeem. He cannot file a bill to set aside the sale, and have the property re-sold, although the mortgagee may have abused the power to sell, and purchased the property himself.

A cross-bill is necessary, where the defendant is entitled to some positive relief, beyond what the complainant's bill will afford him.[2]

Bill to set aside statutory foreclosure, or for leave to redeem. The bill states that, September 13th, 1836, a mortgage was

[1] See Stevens *v.* Brown, *ante*, 41 and note.

[2] See Andrews *v.* Kibbee, 12 Mich., 94; Dye *v.* Mann, 10 id., 291; Wisner *v.* Farnham, 2 id., 472; Caruthers *v.* Hall, 10 id., 40; Farmers and Mechanics' Bank *v.* Bronson, 14 id., 361.

As to the object and scope of cross-bills, see, also, Ballance *v.* Underhill, 3 Scam., 453; Tarleton *v.* Vietes, 1 Gilm., 470; Hurd *v.* Case, 32 Ill., 45; Morgan *v.* Smith, 11 id., 195; Jones *v.* Smith, 14 id., 239; Ferris *v.* McClure, 36 id., 77; Atkin *v.* Merrill, 39 id., 63; Stone *v.* Smoot, 39 id., 409; Howett *v.* Selby, 54 id., 151; Kennedy *v.* Kennedy, 66 id., 190; Thompson *v.* Shoemaker, 68 id., 256; Campbell *v.* Benjamin, 69 id., 244; Wing *v.* Goodman, 75 id., 159.

As to cross-bills in mechanics' lien cases, see Howett *v.* Selby, 54 id., 151; Thielman *v.* Carr, 75 id., 385.

As to making answer a cross-bill, see Thielman *v.* Carr, *supra*.

As to parties to cross-bills, see Kennedy *v.* Kennedy, 66 Ill., 190; Thompson *v.* Shoemaker, 68 id., 256.

As to the hearing of causes wherein a cross-bill has been filed, see Beauchamp *v.* Putnam, 34 Ill., 378; Myers *v.* Manny, 63 id., 211; Hungate *v.* Reynolds, 72 id., 475.

given to Tunis S. Wendell, as trustee for Catharine Schwarz, to Nathan Sears, for $2,000. That, November 3d, 1837, Sears, claiming there was then due on the mortgage $2,220.49, proceeded to foreclose it under the statute, and, on the sale, which took place on the thirty-first day of January following, purchased the premises for $2,274.49, and took the sheriff's certificate for a deed in two years, unless the mortgaged premises should be redeemed before that time. That the statutory foreclosure was not in accordance with the provisions and requirements of the statute, but was radically defective, and variant therefrom, in many particulars, some of which were set out to the bill. That, March 31st, 1838, Nathan Sears sold and conveyed his interest in the premises to Peter Sears, to whom a payment of $1,500 was made, January 31st, 1839, when he agreed to wait for the balance until the first of April following.

That, April 18th, 1839, a further payment was made to
[*171] him of $40, September 7th, 1839, a *payment of $10, and November 7th, 1839, a payment of $120.

The bill prayed that the statutory foreclosure might be declared to be irregular, defective, and absolutely null and void; or, in case it should be held legal, that complainants might be permitted to come in and redeem, they offering to pay whatever was due on the mortgage.

The bill was taken as confessed.

A. D. Fraser & A. Davidson, for complainants.

A. W. Buel, for defendants.

The Chancellor. The only question is as to the form of the decree to be entered. Complainants insist they are entitled to a decree setting aside the statutory foreclosure, and for their costs. Defendants, on the contrary, contend that the decree to be entered should be for a redemption of the mortgaged premises, and, in case of default, for a foreclosure and sale. In other words, they contend that the decree should be the same as if a bill had been filed to foreclose the mortgage. Neither

of these positions, it appears to me, is correct. The bill is, in fact, nothing more or less than a bill for the redemption of the mortgaged premises. As such it must be considered and treated, in all respects. It asks relief on two distinct grounds: *First.* That the equity of redemption is not barred by the statutory foreclosure; and, *Second*, That, if the proceedings under the statute were regular, the foreclosure was opened, by the agreement of the parties, and the receipt of a part of the mortgage moneys under the agreement.

These two grounds for relief differ from each other; yet the relief to which complainants are entitled under either one of them is the same. It is to redeem the mortgaged premises, on paying what is due on the mortgage, *within such time as shall be allowed for that purpose [*172] by the Court; which is usually six months. This is the only relief complainants are entitled to. He who asks equity must do equity. This Court will not prevent a mortgagee from taking possession of the mortgaged premises, or, if he be in possession, deprive him of that possession so long as there is anything due on the mortgage. *Stevens* v. *Brown*, *ante* 41. If a mortgagor whishes to test the validity of a statutory foreclosure, in this Court, he must file his bill to redeem. He cannot file a bill to set aside the sale, and have the property re-sold, although the mortgagee may have abused the power to sell, and purchased the property himself. *Goldsmith* v. *Osborn*, 1 Edw. R. 560; 2 Ball & Beat. 555. And, "where a mortgagee is made a party to a bill, praying relief is the same thing as praying to redeem; for redemption is the the proper relief." *Cholmley* v. *Countess Dowager of Oxford*, 2 Atk. R. 267. *Drew* v. *O'Hara*, 2 Ball & Beat. 562. There is nothing in *Denning* v. *Smith*, 3 J. C. R. 332, or *Sherman* v. *Dodge*, 6 J. C. R. 107, opposed to this doctrine. *Denning* v. *Smith* was not a statutory foreclosure of a mortgage. By a statute of the state of New York, passed in 1808, commissioners were appointed to loan money on mortgage, and, on default of the mortgagor to pay, the commissioners became seized of an absolute estate in the lands, and the mortgagor was barred

of all right and equity of redemption. The commissioners were then to sell the land, and, after paying the state, to pay the surplus moneys to the mortgagor. The only question in that case was, whether the commissioners, as trustees both for the state and mortgagor, had faithfully executed the trust under the statute. The relation of mortgagor and mortgagee did not exist in the case. *Sherman* v. *Dodge*, was somewhat similar. It grew out of a sale made by [*173] *loan officers, but under a law passed in 1786. It is not so fully reported as the case of *Denning* v. *Smith*, nor does it appear, from the report, whether an absolute discharge of the equity of redemption vested in the loan officers, on the default of the mortgagor to pay, as under the act of 1808. The contrary, I think, is fairly to be presumed, for the complainant is mentioned as the owner of the equity of redemption. Supposing this to be the case, it is still no authority for complainants, because the amount due to the state on the mortgage, which was less than fifty dollars, was tendered to the purchaser, and refused by him, before the complainant filed his bill. This sum was undoubtedly paid into Court when the bill was filled. It is not so stated, in the report of the case, but there cannot be much doubt on the subject, for an injunction was granted to stay proceedings in an action of ejectment, and, in the decree finally entered, a note given to the loan officers by the purchaser for the balance of the purchase money, over and above what was due to the state, was ordered to be cancelled, and the purchaser required to release all his interest and title under the purchase, without any mention of the money tendered, which the purchaser must have lost unless it was paid into Court for him;—a result by no means to be presumed, as he was not so much as required to pay costs.

While the ordinary decree, therefore, allowing the complainants to redeem, must be entered, I do not feel authorized, by precedent or on principle, to go further, and decree a sale of the premises, in case they should not be redeemed. The complainants ask to redeem; they do not ask to have the mortgaged premises sold; and, if they had done so, their bill might have

been demurred to for that reason. *Goldsmith* v. *Osborn*, 1 Edw. R. 560. A cross-bill is necessary where the defendant is entitled to *some positive relief beyond what [*174] the complainant's bill will afford him. *Pattison* v. *Hull*, 9 Cow. R. 747. If the defendants wished to have the mortgaged premises sold, they should have filed a cross-bill. In *Hine* v. *Handy*, 1 J. C. R. 6, the order of the Court was that an injunction issue to stay the sale at law, on complainant's paying what should be reported due by the Master. And, in *Nichols* v. *Wilson*, 4 J. C. R. 115, an injunction having been granted to stay proceedings to sell, under a power contained in a mortgage, it was dissolved on terms, viz: that six weeks' further notice should be given, and that a reference should be had, in the mean time, to compute the balance due on the mortgage; on the payment of which, no sale was to be had. There was no positive relief given to the mortgagee, in either of these cases. The relief was incidental to the proceedings instituted by the mortgagor, and the mortagee was at liberty to sell under the power of sale, unless the mortgagor, within a specified time, paid him what was due on the mortgage.

As there has, already, been a reference to a Master, to ascertain the amount due to the defendants, and his report has been confirmed, there must be a decree entered that complainants pay to defendants the amount reported due, with interest from the date of the report, and defendants' costs, to be taxed, within six months; and that, thereupon, defendants reconvey the mortgaged premises to complainants, by a proper deed, to be settled by a Master, free and clear of all incumbrances made or charged by them, or either of them, or any person claiming by or under them, or either of them, and deliver up all deeds and writings in their custody or power, relating to the mortgaged premises. And, in default of complainants' paying the amount reported due with interest and costs, within the six months, the bill to be dismissed with costs to defendants.

[*175]* Warner Wing, Wolcott Lawrence *et al. v.* Christopher McDowell and John Simmons, Jr.

John Simmons, Jr., *v.* Christopher McDowell *et al.*

In equity, a vendee, under a contract for the sale of lands, is considered as a trustee of the purchase money for the vendor, who is regarded as a trustee of the land for the former. The land is in equity the property of the vendee, who may dispose of, or encumber it in like manner with land to which he has the legal title, subject to the rights of the vendor under the contract.[1]

The registry of an instrument not required by law to be recorded, is notice to no one.[2]

Where a person mortgages lands which he holds under a bond for a deed, he conveys thereby no legal interest in the bond, but only an equitable interest, and the registry of such mortgage is notice to no one.

Where the equities of parties are equal, and neither has the legal title, the prior equity will prevail. [3] Nor will a subsequent obtaining of the legal title in right of another and not in one's own right, or with notice of the prior equity, aid the holder of the postponed equity.

The English doctrine of tacking mortgages has not been adopted in this country.

Hearing on original and cross-bills.

The original bill was filed to foreclose a mortgage executed by McDowell to Lawrence, in July, 1839, and assigned by Lawrence to Wing, in trust to pay certain creditors, and to account to Lawrence for the balance.

The cross-bill was filed to foreclose two several mortgages executed by McDowell to Simmons;—one in September, 1838, for $3,000, on a part only of the premises covered by Lawrence's mortgage, and the other in November, 1839, on the

[1] See Fitzhugh *v.* Wilkinson, 34 Mich., 138; Brill *v.* Stiles, 35 Ill., 305.

[2] See Dutton *v.* Ives, 5 Mich., 515; Galpin *v.* Abbott, 6 id., 17; Farmers' and Mechanics' Bank *v.* Bronson, 14 id., 361; Buell *v.* Irwin, 24 id., 145.

[3] See Norris *v.* Showerman, *post*, 206.

whole of the premises. This last mortgage to Simmons was given to secure the payment of the $3,000 mentioned in the first mortgage to him, and $700 subsequently advanced by him to McDowell. The object of the cross-bill was to have that part of the premises *included in the mortgage to [*176] Simmons for $3,000 sold separately, and the $3,000 first paid out of the proceeds. The facts were these: Lawrence was the owner in fee simple of a farm of one hundred and fifty acres, in the town of Raisinville, in the county of Monroe, on which were a saw-mill and water power. June 12th, 1838, he agreed to sell to McDowell for $500, that part of the farm subsequently mortgaged by the latter for $3,000 to Simmons, and took his two promissory notes for $250 each, payable with interest, one in a year, and the other in eighteen months, and gave McDowell a bond in the penal sum of five thousand dollars, for a deed, on his paying the notes, and erecting and putting into operation a paper-mill on the premises, within a year from that time. McDowell took possession of the premises, and, within the year, erected and put into operation the paper-mill; and September 8th, 1838, executed the mortgage to Simmons, for $3,000, which was acknowledged and recorded on the same day.

August 31st, 1838, Lawrence conveyed the balance of the farm to one William Tuthill, and took back a mortgage from Tuthill, for $1,950. Tuthill, February 7th, 1839, sold and deeded seven acres of the land purchased of Lawrence, including the saw-mill and water power, to McDowell, for $11,500, and took from McDowell a bond and mortgage, of the same date, for the payment to himself of $9,476.52, and to Lawrence of the $1,950 mortgage, executed to him by Tuthill. This mortgage covered not only the premises conveyed to McDowell by Tuthill, but also the premises which Lawrence had bound himself by his bond to convey to McDowell, and which had been mortgaged by McDowell to Simmons. The mortgage was recorded March 14th, 1839, and on the twenty-fifth day of the same month, the mortgage and bond were assigned by Tuthill

[*177] *to Lawrence, and the assignment was recorded on the third day of July following. Neither Tuthill nor Lawrence, at this time, had any knowledge of Simmons' mortgage, or that he was in any way interested in the premises which Lawrence was to convey to McDowell. Afterwards, Lawrence, wishing to assign the bond and mortgage to Wing, caused the registry of deeds and mortgages to be examined, to enable him to exhibit an abstract of his title under the mortgage; and, in the meantime, he made an arrangement with McDowell to give him a deed for the premises which he had, by his bond, agreed to convey to him, and to cancel the aforesaid bond and mortgage from McDowell to Tuthill, and take a new bond and mortgage on the same premises from McDowell to himself. The papers were made out; but, before they were executed and delivered, the examination of the registry led to the discovery of Simmon's mortgage, of which both Lawrence and Wing had notice before the arrangement between McDowell and Lawrence was consummated. McDowell's two notes, of $250 each, to Lawrence, were included in the new bond and mortgage. A draft at ninety days had previously been given on Simmons, for one of these notes, which draft was paid by Simmons when it became due. July 23d, 1839, Lawrence assigned the bond and mortgage to Wing. November 8th, 1839, McDowell executed the second mortgage to Simmons.

D. A. Noble, for complainant in cross-bill.

Wing & McClelland and Joy & Porter, for complainants in original bill and defendants in cross-bill.

D. A. Noble.

I. The rights of Simmons are superior to those of complainants in original bill, being prior rights.

[*178] *1. Lawrence, it is true, has his priority for that part of the purchase money ($250) which has not been paid. Subject to this, McDowell's mortgage to Simmons, being the first one made, and being made for money advanced in building

the mill on the premises, was superior to all subsequent incumbrances. Even if no mortgage had been made, Simmons had an equitable lien for his advances.

2. Tuthill's mortgage from McDowell cannot be held a prior incumbrance, in right, for purchase money. It was given to secure the purchase money of another part of the premises, and although covering the land mortgaged to Simmons, does not, therefore, affect it in the same way as it does the rest.

3. Tuthill's assignees took no better right than he had himself, and, if they claim under the mortgage from McDowell to Tuthill, they must be postponed to Simmons's prior equity. If they claim under the subsequent arrangement, it was made with full and actual notice of Simmons's right.

II. McDowell's rights were such as enabled him to mortgage the interest he obtained under his contract.

1. The vendor is, in equity, owner of the fee from the date of the contract; the vendee being considered only as trustee for him, till the contract is completed by conveyance. 1 Sudg. on Vend., 211, 214; 6 J. C. R., 398.

2. Equitable rights may be mortgaged as well as a legal estate. The contract might have been assigned, and whatever is the subject of purchase and sale may be mortgaged. 2 Story Com. on Eq., 289; *Wadsworth* v. *Wendell*, 5 J. C. R., 224; 1 J. C. R., 394.

III. The registry of Simmons's mortgage was constructive notice to all the world of its existence and contents. 1 Story Com. on Eq., 392.

*This rule applies to equitable as well as legal mort- [*179] gages. 1 J. C. R., 394.

Joy & Porter.

I. The mortgage from McDowell to Simmons conveyed no interest in the land described in it; the fee being at the time in Lawrence.

1. McDowell might have assigned or mortgaged the contract, and thus placed Simmons in his place with regard to the premises, but he could not mortgage more than he possessed. Sim-

mons could not foreclose his mortgage as against Lawrence. And his rights under the contract, if that had been transferred to him, would have been subject to contain *conditions*, which must have been complied with, before he could claim its benefit.

2. The mortgage is a nullity. It does not convey, or purport to convey, anything which McDowell possessed.

3. This case does not stand on the same ground as a mortgage of an equity of redemption. *That* is an *estate* in the land, and not a *mere right*. And here there was not even the right until the land was paid for.

II. The subsequent arrangement cannot give Simmons any right, or make good his mortgage which was before a nullity, by enuring to his benefit.

1. The title to the land never having passed from Lawrence until that arrangement, and the deed and mortgage back being one transaction, nothing can step between them to impair or destroy the mortgage security. In such cases of instantaneous seizin, neither judgment, right of dower, process of law, nor any equity, can intervene to destroy the mortgagee's priority.

Where one, who has not procured the title to a piece of property, quit-claims, mortgages, or conveys in any way, *without covenants as to title or warranty*, and subsequently [*180] *procures the title, it will not enure to the benefit of the previous quit-claim, mortgage, or conveyance.

D. A. Noble, in reply.

I. The mortgage to Simmons was in all respects, in equity, a good and valid mortgage, and conveyed whatever right McDowell had under the bond for a deed.

1. It is of no consequence that the contract was in form a penal bond. An assignee of such an instrument may maintain an action for specific performance; and the Court will consider it in the nature of an agreement.

2. McDowell was in possession of the land, making valuable improvements, and entitled to retain it on the performance of certain conditions. Most of the conditions have been complied

with;—all except the payment of the $250 note;—and even this may be fairly claimed to have been removed as a lien on the property, by the final arrangement, which affords good reason for supposing that McDowell's personal responsibility was looked to for payment. In equity then, he had an *interest in the land.*

3. The mortgage conveyed whatever interest McDowell had. The case is similar to that of one who, having an estate for years, purports to convey one for life, where the deed is good so far as regards the estate which the grantor possessed. So, a mortgagee under a receiver's certificate is preferred to the grantee whose deed was subsequent to the patent.

II. As Simmons appears in the suit as a defendant it is not incumbent upon him to show the same complete performance, which would be required, if he were seeking a specific performance affirmatively. The complainants in the original bill have no right to have his mortgage, or the contract upon which it is based, set aside; because there *has been a [*181] substantial, if not perfect, performance of the requisite conditions.

III. The validity of the Simmons mortgage did not, in equity, depend upon the subsequent deed to McDowell. It was a valid mortgage of the land, upon the doctrine above referred to, that the contract created mutual trusts in the vendor and vendee, by which the latter acquired the estate in the land.

The Chancellor. The rights of the parties are the same now, as before the agreement was entered into between McDowell and Lawrence, to cancel the Tuthill mortgage, and give one running directly to Lawrence, in its place. All parties had notice of the $3,000 mortgage to Simmons, before the change was made; and what has taken place since cannot affect his rights.

It is said McDowell might have sold, or mortgaged, his contract, but that he had no interest in the land itself, to mortgage, the title being in Lawrence. At law, a contract for the pur-

chase of land gives the vendee no interest in the land; but the rule is otherwise in equity, which considers the vendor, as to the land, a trustee for the purchaser, and the vendee, as to the money, a trustee for the seller. In equity, the land belongs to the vendee, and may be sold, devised, or encumbered by him, and, on his death, will descend to his heirs. *Seton* v. *Slade*, 7 Ves. R., 265, 274; 6 Ves. R., 353. *Champion* v. *Brown*, 6 J. C. R., 398. It must be taken, however, subject to the rights of the vendor under the contract. And, McDowell having an equitable interest in the land under the contract, the mortgage from him to Simmons was an equitable mortgage of that equitable interest.

This mortgage was recorded on the day it was executed, and it is insisted that the registry of it was notice, to [*182] *both Tuthill and Lawrence, in their subsequent dealings with McDowell, and with each other. The registry of a deed or conveyance required by law to be recorded, when properly registered, is notice to subsequent purchasers of the existence and contents of such deed or conveyance, in equity, as well as at law. If an instrument should be registered, which the law does not require to be registered, the record of it would be notice to no one; for, no person is expected, much less bound, to examine the registry for that which has no business to be there. Our registry law, it seems to me, has reference to conveyances of the legal estate, or interest in law, only, except where a trust is created, or declared, in writing, which, to be notice to subsequent purchasers, the statute requires to be recorded. The language of the statute is: "No bargain and sale, or other like conveyance of any estate in fee simple, or for life, and no lease for more than seven years from the making thereof, shall be valid and effectual against any other person than the grantor, and his heirs and devisees, and persons having actual notice thereof, unless it is made by a deed recorded as provided in this chapter." R. S., 260. In *Parkist* v. *Alexander*, 1 J. C. R., 397, Chancellor Kent thought the better opinion was, that the registry of an equitable mortgage was notice to a subsequent purchaser of the legal estate. His opinion in that case,

however, was based on the peculiar phraseology of the registry act itself. He says: "The statute I have cited speaks of any '*writing in the nature of a mortgage*,' and these words may reach to any agreement creating an equitable encumbrance." The language of our statute is not so broad, and the case of *Parkist* v. *Alexander*, consequently, is no authority that the registry of a mere equitable mortgage, like the one to Simmons, is, under our statute, notice to subsequent purchasers.[1]

*The mortgage to Tuthill stood on the same footing [*183] with that to Simmons, with this difference, that Simmons's mortgage was prior in time. They were both liens on McDowell's equitable interest in the land, and neither of them was an assignment of the bond for a deed by way of mortgage. Neither Simmons nor Tuthill acquired any legal interest in the bond; neither could have sued Lawrence for a breach of its condition; their interest was purely equitable, not legal, and their remedy against Lawrence, as well as McDowell, such as could be had in a court of equity only. What then were the relative rights of Simmons and Tuthill, under their respective mortgages? The rule in equity on this point is well expressed by Chancellor Walworth, in *Grimstone* v. *Carter*, 3 Paige R. 436. He says: "It is the settled doctrine of the Court, that, when the equities of the parties are equal, and neither has the legal title, the one who has the prior equity must prevail. Nor will the Court permit the party having the subsequent equity to protect himself by obtaining a conveyance of the legal title, after he has either actual or constructive notice of the prior equity." As between these two mortgages, then, Simmons's mortgage, being prior in time, was prior in right; and this priority was not destroyed, or lost, by the assignment of the Tuthill mortgage to Lawrence without notice of the prior mortgage. Tuthill had no notice of the mortgage to Simmons, when he took his mortgage; and an assignment of it to a third

[1] The registry of a similar mortgage was held not to be notice to subsequent purchasers from the mortgagor, after he had acquired the legal title, in the case of The Farmer's Loan & Trust Co. *v.* Maltby, 8 Paige R. 361.

person, without notice, could not give the assignee a better right than Tuthill himself had. Lawrence acquired the right of Tuthill, and nothing more. There was not a union of the legal estate and a subsequent equity *in the same right*, for Lawrence held the legal title *in trust* for McDowell; and, before the agreement was consummated to cancel the Tuthill mortgage and give another in its place, when he acquired
[*184] *the legal estate in his own right, both he and Wing had notice of the Simmons mortgage. The English doctrine of tacking, which, perhaps, would be applicable to such a case, has not been adopted in this country. 1 Caines Ca. 112; 3 Pick. R. 50; 1 Hopk. R. 234; 4 Kent Com. 178, 179.

The premises included in Simmons's mortgage must be sold separately, and, out of the proceeds thereof, the $250 note given by McDowell to Lawrence for the purchase money, must first be paid, (the other note having been paid,) and then Simmons's mortgage for $3,000; and with the balance, if any, and the proceeds of the residue of the mortgaged premises, the Lawrence mortgage must then be paid, and then Simmons's second mortgage.

[*185] *Trowbridge *et al. v.* Harleston and Ogden.

Where time has been extended for the performance of conditions, a party seeking to avail himself of the extension, must allege a readiness to perform within the time as extended, and notice thereof.[1]

Where two persons have a lien on the same piece of property which is not sufficient to satisfy both, and one has a lien for his debt on another piece of property, he must exhaust the latter before he can resort to the common fund.[2]

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[1] See Hammond *v.* Michigan State Bank, *post*, 214.

[2] See Mason *v.* Payne, *post*, 459 and note; Marshall *v.* Moore, 36 Ill., 321; Dodds *v.* Snyder, 44, id., 53.

THIS was a hearing on pleas.

Wing, for complainants.

Noble & Backus, for defendants.

THE CHANCELLOR. The plea of Harleston must be overruled. The foreclosure of the mortgage on the Cook farm, is not a condition precedent to the foreclosure of the mortgage on the Robert farm.

A specific execution of the agreement of August 31st, 1839, would not now be decreed; the extension of credit which Harleston was to have under it having already expired. By the agreement of September 2d, 1839, Harleston was to have sixty days from that time, to perform the agreement made in August; and the plea does not aver a readiness to perform within the sixty days, and notice thereof to complainants, or the bank.

Ogden's plea stands on different ground. It alleges the Cook farm is valuable, and will bring enough to pay the principal part of complainants' mortgage on the Robert farm, over and above all other debts the complainants or bank have against Harleston; and that the Robert farm is insufficient to satisfy both his and complainants' mortgage. The plea must, therefore, be allowed, on the equitable *ground that, [*186] where two persons have a lien on the same piece of property, which is not sufficient to satisfy both, and one of them has also a lien for his debt on another piece of property, he must exhaust his lien on the latter, before he resorts to the property on which both have a lien. Hopk. R., 460. Harleston is insolvent.

John De Armand *v.* John Phillips.

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When a party is entitled to rescind a contract, he should act promptly and not sleep on his rights, or take time to speculate on the course of events. If he goes on, with a full knowledge of his rights, recognizing the contract as still in force, and, by his acts and conduct, tacitly gives his assent to its execution in a manner different from the original understanding of the parties, he is not entitled in equity, to have either the contract rescinded, or any relief inconsistent with what may fairly and reasonably be presumed, from his own acts, to have been assented to by him.[1]

This was a bill for specific performance.

The bill states that complainant owned a farm in Bertrand, Berrien county, Michigan, in the south half of the southeast fractional quarter, of fractional section eighteen, town eight, south of range eighteen west, containing eighty acres. That, being desirous of adding thereto, for his convenience as a farmer, he, in February, 1839, negotiated with defendant for the purchase of an undivided forty-five acres of an adjoining tract lying south of his farm, in which tract defendant pretended to have an equal interest in fee simple, in common with E. Thomas, *as evidenced* by a certificate from the land office at Kalamazoo, No. 23,737. That the tract is the east half of fractional section numbered nineteen, in town eight, south of range eighteen
[*187] *west, in Berrien county, containing, according to the United States survey, two hundred and five acres, and eighty-five hundredths of an acre. That the result of the negotiation was a purchase in fee simple, of forty-five acres of the undivided interest of defendant in that tract, for eight hundred dollars, payable in installments. That defendant agreed to convey in fee simple, on May 1st, 1839, forty-five acres of his undivided interest, and also that, when partition should be had, complainant should have his forty-five acres set

[1] See Wilbur *v.* Flood, 16 Mich., 40; Martin *v.* Ash, 20 id., 166; Schwarz *v.* Wendell, *post*, 268.

off, in fee simple, adjoining his farm, at the cost and expense of defendant. That, on February 11th, 1839, complainant and defendant went to J. G. Ames, a justice of the peace, to have the agreement reduced to writing. They stated the terms of it to Ames, who drew up articles of agreement which were then executed, and delivered to Benjamin Redding for safekeeping. The bill sets out the substance of the agreement, and that complainant was to have his forty-five acres set off next to his farm, *if the arbitrators should so award.*

That, by a mistake of Ames, the written agreement does not conform to or agree with the instructions given him, in that it does not describe, fitly and accurately, the tract of land in which complainant purchased an interest which he avers was forty-five acres of defendant's equal undivided interest in and to the *east half* of fractional section nineteen, instead of the *southeast quarter* of said section. Nor does it conform to the instructions in properly expressing the agreement that, in the partition, complainants should have set off in fee simple, at the expense of Phillips, forty-five acres from the north side of the track adjoining complainant's farm on the south. That, to obtain partition at law prior to the time designated by the agreement, Phillips consented to execute a deed, and, on February 27th, 1839, he did execute, with his wife, a deed of *bargain and sale of fifty-five acres of his undivided [*188] interest in the east half of fractional section nineteen, town eight south, of range eighteen west, being the same premises mentioned, or *intended*, in the articles of agreement. The bill sets out the covenants in the deed, and avers that complainant has paid all the purchase money but $250 embraced in a note, on which suit had been brought, and was at issue. That complainant, since the making of the deed, has discovered that when the deed was made, defendant did not make a good title. That the title is still in the United States; that no valid certificate or patent, or other evidence of title, has ever issued from the United States to defendant, or any one else, for said premises or any part thereof; that certificate No. 23,737 is invalid, erroneously issued, and declared to be so by the United

States. That Thomas is a separate purchaser of one hundred and sixty acres of said east half of fractional section nineteen, lying in the form of a regularly surveyed quarter section; and Phillips is a separate purchaser from the United States of the remainder of said east half, containing forty-five acres and eighty-five hundredths of an acre, having as its north boundary line the south line of Thomas's quarter section. That neither Thomas nor defendant has yet taken any certificate or other evidence of title to said tract so purchased by them. That, about February 24th, 1840, Thomas quit-claimed to Phillips in fee, all his title and interest to the south half of said east half of fractional section nineteen, containing one hundred and two acres and ninety-two hundredths of an acre. And, since the making of said warranty deed of defendant to complainant, Phillips quit-claimed his interest in fee in the same tract to Thomas.

That after complainant discovered defendant's want of title, he entered into possession with defendant's assent, [*189] *and consented temporarily to occupy and cultivate, and has so occupied and cultivated forty-five acres next adjoining, on the south, the south half of said east half of frational section nineteen, the said forty-five acres being part of said quarter section purchased by Thomas, and part of that which Thomas quit-claimed to defendant. That complainant has expended large sums in improvements, with defendant's consent, and has always been ready to pay on receiving a marketable title.

Prays for specific performance by defendant of his agreement, and that he may make a good title; or else refund what has been paid for purchase and improvements.

The defendant's answer admits that complainant occupied the farm mentioned in the bill, and that, in February, 1839, he applied to defendant to purchase an undivided interest, amounting to forty-five acres, in the adjoining tract. States that this tract (of defendant and Thomas) was originally known as the east half of a fraction numbered nineteen, town eight south, of range nineteen west, containing but two hundred and five acres

and eighty-five hundredths of an acre, and was surveyed as one legal subdivision equivalent to a quarter section, and was, entered jointly by defendant and E. Thomas, at Kalamazoo, where they received certificate No. 23,737, dated September 29th, 1838. Admits he knew complainant's object in purchasing from him, and that, on the eleventh day of February, 1839, Ames drew up the articles of agreement set forth in the bill. That, after the agreement was made, defendant and Thomas were notified of an alteration in the survey, and that, unless defendant and Thomas lived on the distinct quarter, they could not *jointly* hold, but one would have the quarter, and the other the fraction. That, in fact, Thomas lived on the quarter, and defendant on the fraction, but defendant had advanced an equal amount *of purchase money for the [*190] whole, supposing they could jointly hold, and he was, therefore, equitably entitled to half of the premises. That this information was communicated to complainant. Admits the quit-claim deeds between defendant and Thomas, dated February 26th, 1840, the nominal consideration being one hundred dollars, but the real one being the facts above stated. Thomas quit-claimed to defendant all his interest in the south half of the east half of fractional section nineteen, it being the half of said east half lying south of an east and west line drawn through it parallel to the Indiana state line, and being the south half of the land held by Thomas and defendant jointly by duplicate, &c. Defendant quit-claimed to Thomas the north half of said premises. That both these deeds were made with the advice and consent of complainant, who is a subscribing witness to one or both of the deeds, and who also advanced money to pay for effecting this agreement, and to pay counsel. Admits that defendant made the deed to complainant as set forth in the bill, with covenants, &c. Says this deed was made at the urgent request of complainant, and to enable him to effect partition. That the deed was not fully read or understood by defendant, but he was informed the same was consistent with his title, and took an agreement from complainant and Ames, to indemnify him against any damage that might ensue

on giving such a deed. Insists that the duplicate is valid to sustain a quit-claim deed, and that the title enures to the complainant under the warranty deed. Admits that no patent or new certificate was taken out, but insists there was no necessity for any. Admits that, after the quit-claim deeds, complainant entered on forty-five acres, on the south half of the quarter section conveyed by Thomas to defendant, and that complainant had full knowledge of all the facts touching the
[*191] *premises and the title in question, and says this entry was made and occupation had, under and by virtue of a parol agreement and partition by and between defendant and complainant. That complainant agreed to take his forty-five acres from the south half of said quarter section, and, in pursuance of this agreement, defendant set off to him, by admeasurement, his forty-five acres, which he has entered upon and still occupies under his deed and the parol partition.

Denies that defendant ever deceived complainant concerning his title, or that any lands except those mentioned in the duplicate were ever spoken of between them, and says that reference was particularly had to the land afterwards included in the separate quarter. Denies that there was any mistake in the agreement executed, or any fraud in relation to it, but says the premises were mentioned and located so as best to ascertain the portion which the complainant wished to obtain, with a view to partition. The agreement was fairly read to complainant, and fully expresses the intention of the parties. It was never understood that defendant should guaranty the forty-five acres to be set off next to complainant's farm, or that the payment was to depend upon such contingency. Denies that the bargain was different from the agreement executed.

Denies that defendant agreed to bear the cost of partition, or that he obtained a higher price on account of any such agreement, or that he agreed complainant should certainly have the forty-five acres next to his farm. Says that complainant understood the whole matter, and calculated the chances of his obtaining the desired location. Denies that complainant was not fully informed of all the facts, at the time of taking the deed.

Says that defendant was inclined to defer giving the deed, and to rescind, *but complainant insisted on having the [*192] deed. Denies that the duplicate was or is invalid, or erroneously issued so as to render the same void or voidable, or that it has been invalidated, recalled, or avoided, by the United States, any further than the fraction. Submits that the certificate was good to Thomas, especially after the release be defendant, so that no new certificate was necessary. Denies that complainant has expended much money; denies encumbrances, and submits that defendant has complied with his agreement.

Complainant filed a general replication.

V. L. Bradford, for complainant.

I. The defendant has failed to perform the agreement made with complainant, and the Court will therefore grant such relief as is meet.

1. He has failed to give the complainant a legal title to any portion of the land. He had no title whatever, legal or equitable, in the quarter section, which belonged to Thomas, until the quit-claim from Thomas to him. He has never obtained a legal title, and it is questionable, from the facts of the case, under the pre-emption laws, whether he has even an equitable title.

2. The patent for the quarter section can issue to no one but Thomas.

3. He has not obtained for complainant the precise land specified.

II. Complainant has done no act amounting to a waiver of his rights, and nothing has happened which could prevent his right to relief.

1. No act of waiver took place in the transactions between defendant and Thomas, and complainant lost no right by being a witness and acquiescing in defendant's deed to Thomas, because that deed conveyed no title.

*2. Even if that conveyance had been effectual, it [*193] would have created no waiver. Such waiver must be *express.*

3. There was no *valid consideration* for a waiver, and such consideration was necessary.

4. The complainant had a right, without relinquishing his claim to damages, to assent to any act by which Phillips would be enabled to perform any part of his agreement.

5. Complainant's possession and occupation of the forty-five acres, was no waiver. *First.* Because the parties still considered the agreement of February, 1839, binding, and the occupation was meant to be only temporary. *Secondly.* Because such parol partition is contrary to the statute of frauds. *Thirdly.* Because defendant can make no legal title to the lands.

6. The agreement of complainant and Ames, with defendant, *not being under seal*, did not release the covenants in defendant's deed. There was also no sufficient consideration.

III. As to what relief complainant is entitled to.

1. He is entitled to a specific performance of the whole contract. To enable the Court to decree a specific performance against a vendor, it is not necessary that he should have the legal estate; for, if he has an equitable title, a performance *in specie* will be decreed, and he must obtain the concurrence of the person having the legal estate. The vendor is considered a trustee for the purchaser.

2. A court of equity will compel a vendor to a specific performance for a part of the land, where he has incapacitated himself from conveying the whole.

3. For the residue he will be entitled to damages. Equity is sometimes done between the parties on the principle of compensation, for deficiency in quantity or quality, &c.

[*194] *Or, a compensation in damages for the whole may be given, to be ascertained by reference to a Master. It is true, generally, that a purchaser may take what he can get, with *compensation* for what he cannot have.

Green & Dana, for defendant.

C. Dana.

I. There was no fraud or misrepresentation on the part of

defendant. The bill is proved to be false in several particulars, and the maxim, *falsus in uno, falsus in omnibus*, applies.

II. There was no *mistake* in the *agreement* of the parties, and no *mistake* in the manner in which defendant and Thomas obtained pre-emption. The difficulty arose from an act of the United States government, viz: a new division of the land, on a new construction of the law. And a mistake in regard to the *law*, does not entitle a man to relief, either in law or equity.

III. All the relief to which the complainant might have had pretense, on learning the new action of the United States, was, by his subsequent voluntary acts, waived, abandoned, and discharged by him.

1. He procured a quit-claim deed from Thomas to defendant, at defendant's expense of $100, in addition to what he paid at the land-office.

2. He paid the defendant afterwards, voluntarily, $250, and has occupied the land in severalty, nearly three years.

This Court will relieve against a clear case of mistake or fraud, but never against the voluntary acts of the party.

IV. There is no failure of consideration. The complainant has a warranty deed, and there has been no *eviction* by paramount title. There is no fraud shown, and therefore there is no ground for asking relief.

*V. Defendant is entitled to a decree for the amount [*195] of his note for $250, given May 1, 1841, and interest and costs, as indemnity for the delay to which has been subjected by this bill.

The Chancellor. In September, 1838, the defendant, and one Ezekiel Thomas, purchased at the land office at Kalamazoo, the east half of fractional section nineteen, town eight south, of range eighteen west, containing two hundred and five acres and eighty-five hundredths of an acre, under an act to grant pre-emption rights to settlers on the public lands, passed by Congress that year, and took a certificate from the receiver of the land-office, of the payment of the money. The certificate described the land as the north half of the northeast quarter,

and lots numbered one and two, of section nineteen, town eight south, of range eighteen, west. Complainant owned a farm of eighty acres, adjoining the tract on the north, and, being desirous of enlarging his farm, on February 11th, 1839, entered into a written contract with defendant for the purchase of forty-five acres of his undivided half, for which he was to pay $800; —$300 on the first of May following, when a deed was to be given, $250 on May 1st, 1840, and a like sum May 1st, 1841. By the contract, defendant agreed that complainant should have his forty-five acres next to his farm, "provided the arbitrators should so award it." On the first of March, instead of the first of May, at the urgent solicitation of complainant, defendant and wife executed a warranty deed to him for his forty-five acres. Defendant, at first, refused to execute the deed, on the ground a patent had not then been obtained for the land; and, to induce him to execute it, complainant and one Joseph G. Ames agreed in writing to stand between him and all [*196] harm, and "to pay all *damages he might sustain by reason of any illegal right to convey by deed his interest, or any part thereof, by a warranty deed." The bill charges there was a mistake made in drawing the contract, but this is disproved, both by the answer, and the testimony of Ames, who drew up the contract. Up to the execution of the deed on the first of March, and, I may say, throughout, for aught I can discover to the contrary, the defendant dealt fairly and honestly with complainant. There was no fraud, no misrepresentation or concealment of his interest in the land; and complainant was aware of all the facts and circumstances relating to the title, as fully as defendant himself. He knew defendant and Thomas resided on different parts of the land; that they claimed it jointly under the pre-emption act of 1838, and that they had proved their claim, paid their money, and rightfully obtained a certificate from the receiver at the proper land-office. He also knew he must run the risk, when the land was divided, of having his forty-five acres set off adjoining his farm. Defendant had given his consent to such a partition, but he had gone no further; he had not agreed Thomas should assent to it. He

was bound to give a deed in May, at which time, in all probability, he expected that he and Thomas would be in possession of the patent; for, when he was applied to for a deed, in February, he refused to give it until he was indemnified, as above stated. Soon after the deed was executed and delivered, probably in April, as appears from the testimony of Everett, defendant and Thomas received a notice from the land-office that the surveyor general had altered the survey of the section, by dividing the east half of it into a distinct quarter, with a fraction on the State line between Michigan and Indiana, and that, if they both resided on the quarter, they could hold it jointly; but, if one resided on the quarter, and the *other [*197] on the fraction, each could take the one on which he resided. Thomas, in fact, resided on the quarter, and defendant on the fraction. This alteration of the original survey is what has probably given rise to this suit.

Thomas and defendant had, in good faith, taken the land jointly, each advancing one-half of the purchase money; and, after the alteration was made, neither could take the part to which he was entitled under it, without first annulling the agreement by which they had taken the land together. Nor, even then, could defendant take the fraction, until the contract and deed between him and complainant were also annulled; the pre-emption law requiring the claimant to take an oath that he had not directly, or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatever, whereby the title which he might acquire should enure to the use or benefit of any one except himself, or to convey or transfer the land, or the title which he might acquire to the same to any other person or persons, at any subsequent time. Laws U. S., vol. 9, p. 801. To obviate this difficulty, as it would seem, for the parties had dealt with each other in good faith, and had intended no violation of the pre-emption act, Thomas and defendant held on to the receiver's certificate of September, 1838, and afterwards, on February 26, 1840, executed mutual quit-claim deeds to each other, Thomas quit-claiming the south half of the land to defendant, and defendant

the north half to Thomas. This was done with the approbation and consent of complainant, who was a witness to the deed from Thomas to defendant, and advanced the latter money to enable him to bring about the arrangement. Chipman, in his testimony, says he acted as defendant's counsel in procuring the quit-claim deed from Thomas; that Thomas at first re-
[*198] fused to execute one, but afterwards *consented, on being paid $75; that complainant came with defendant to get the deed drawn; and that he advanced the $75 to pay Thomas, and accepted an order for $25 drawn on him by defendant, in favor of witness for his services, which he afterwards paid. He also understood the object of the deed was to enable defendant to make a conveyance of a part of the land to complainant, and that the money advanced was a part of the purchase money, in the bargain for the land between complainant and defendant.

Long before this, and after he had become acquainted with all the facts in regard to the receiver's certificate, and defendant's title under it, complainant took possession of forty-five acres of the land, it being the north part of the south half subsequently quit-claimed by Thomas to defendant. The bill and answer disagree as to the character of this possession. Complainant says he took possession with the assent of defendant, and with a view to occupy and cultivate it temporarily only, whereas the defendant says it was under a parol agreement between them for a partition of the land. No part of the $800 had been paid when defendant was notified of the alteration of the original survey, and the effect it would have on the certificate. This was the last of March, or forepart of April, preceding the first of May, when $300 was to be paid, and I am inclined to believe, from the evidence, that complainant was in possession of all the facts, before the $300 was paid. However that may be, it appears he was in possession of them long before the $250, falling due in May, 1840, was paid by him.

If complainant was entitled to any relief in equity, it was to have the contract between him and defendant rescinded, and defendant's deed to him cancelled, on learning the

action of the government on the land-office *certifi- [*199]
cate. This he would, probably, have been entitled to, on the ground of mutual mistake, as both parties had a right to suppose, when the contract was entered into, and the deed given, that a patent would be issued in accordance with the receiver's certificate. But he has clearly waived this right by his subsequent conduct, and tacitly, at least, agreed to take his forty-five acres in the south half of the land, to which the defendant had an equitable title, with the legal title in the government; and to rely on the defendant's warranty of that title, and the strong probability there was that government would not molest him in the enjoyment of the property, as a protection against the legal title. When a party is entitled to rescind a contract, he should act promptly, and not sleep on his rights, or take time to speculate on the course of events. If he goes on, with a full knowledge of his rights, recognizing the contract as still in force, and by his acts and conduct tacitly gives his assent to its execution, in a manner different from the original understanding of the parties, he is not entitled, in equity, to have either the contract itself rescinded, or any relief inconsistent with what may fairly, and reasonably, be presumed from his own acts to have been assented to by him.

Bill dismissed, with costs to defendant.

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*Charles Thayer *et al. v.* Charles W. [*200] Lane *et al.*

An administrator appointed in another State has no interest in the real or personal property of his intestate here. Nor has an administrator appointed in this State any interest in, or authority over, real estate, unless the personal property of the deceased is insufficient to pay his debts, and then he can only dispose of it after express permission given by the judge of probate, on application made for that purpose.[1]

[1] As to the right of possession of the land of the deceased, see Comp.

No decree will be entered against an infant on a bill taken against him as confessed, or on the answer of his guardian *ad litem*, admitting the facts stated in the bill. The answer, in such case, is regarded as a pleading merely, and cannot be used as evidence for, or against, the infant, against whom the complainant must prove his case.[1]

In equity, as between partners themselves, real estate purchased by them with partnership effects, is partnership property, and, on the dissolution of the firm, should be divided as such, each party taking the same share in it as in the personal property, unless at the time of the purchase it was understood to be an individual and not a partnership transaction.[2]

A partition will be decreed according to the equitable rights of the parties. But, to enable the Court to make such decree, their equitable rights should appear from the pleadings.

The relief given by the Court must be consistent with the case made by the bill.[3]

THIS was a bill for a partition of land.

It is unnecessary to state the pleadings and testimony in the cause, as they will appear in the opinion of the Court.

Laws, 1857, § 2904; Comp. Laws, 1871, § 4407; Streeter *v.* Paton, 7 Mich. 341; Marvin *v.* Schilling, 12 id., 356; Kline *v.* Moulton, 11 id., 370; 19 id., 116; Holbrook *v.* Campau, 22 id., 288; Campau *v.* Campau, 25 id., 127.

[1] See Chandler *v.* McKinney, 6 Mich., 217; Smith *v.* Smith, 13 id., 258; Waugh *v.* Robbins, 33 Ill., 182; Hitt *v.* Ormsbee, 12 id., 166; Hamilton *v.* Gilman, id., 266; Tuttle *v.* Garrett, 16 id., 354; Reddick *v.* State Bank, 27 id., 148; Masterson *v.* Wiswould, 18 id., 48; Carr *v.* Fielden, id., 77; Peak *v.* Price, 21 id., 164, withdrawal of plea; Tibbs *v.* Allen, 27 id., 129; Chaffin *v.* Kimball, 23 id., 36; Cost *v.* Rose, 17 id., 276; Thomas *v.* Adams, 59 id., 223; Campbell *v.* Campbell, 63 id., 502; Rhoads *v.* Rhoads, 43 id., 239; Quigley *v.* Roberts, 44 id., 503; Barnes *v.* Hazleton, 50 id., 429; Ewell's Lead. Cases on Infancy and Coverture, 229, *et seq.*

The fact that the guardian *ad litem* of an infant defendant does not answer for the infant, does not deprive the court of jurisdiction over the infant. Goudy *v.* Hall, 36 Ill., 313. See Ewell's Lead. Cases, 235.

[2] See Moran *v.* Palmer, 13 Mich., 367.

[3] See Jerome *v.* Hopkins, 2 Mich., 96; Cicotte *v.* Gagnier, id., 381; Warner *v.* Whittaker, 6 id., 133; Bloomer *v.* Henderson, 8 id., 395; Bomier *v.* Caldwell, id., 463; Barrows *v.* Baughman, 9 id., 213; Wurcherer *v.* Hewitt, 10 id., 453; Dunn *v.* Dunn, 11 id., 284; Peckham *v.* Buffam, id., 529; Perkins *v.* Perkins, 12 id., 456; Moran *v.* Palmer, 13 id., 367; Converse *v.* Blumrich, 14 id., 109; Hubbard *v.* Wisner, 15 id., 146; Payne *v.* Avery, 21 id., 524; Fosdick *v.* Van Husan, id., 567; Ford *v.* Loomis, 33 id., 121; Smith *v.* Rumsey, id., 183.

Miles & Wilson, for complainants.

C. W. Lane, in person.

The Chancellor. The bill is filed for the partition of sixteen village lots in the village of Ann Arbor. In August, 1829, Richard H. Root and Samuel Wheeler, both of whom are now dead, purchased the lots in question of one *Elisha Belcher. Root and Wheeler, at the time of the [*201] purchase, were partners in the manufacture of iron, in the State of Ohio, where they resided. Root owned two-thirds, and Wheeler one-third of the partnership interest, and the lots were purchased with partnership effects. These facts do not appear from the pleadings but from the evidence in the case. The bill states that Root was seized in fee of two undivided thirds, as tenant in common with Wheeler, who was seized of the other third. The latter died in October, 1831, and, in December following, Aaron Wheeler and Charles Wheeler were duly appointed administrators of his estate by the constituted authorities of the State of Ohio. In June, 1834, Root deeded twelve-sixteenths of the lots to the defendant, Monroe, who, in September following, conveyed twelve of the lots to Thayer, four of which Thayer still holds, and the other eight, having been conveyed by him, are severally held by some one of the other complainants, or the defendant, Howlet, under Thayer's title. The bill states that a parol partition was made of the lots, in 1834, by Charles Wheeler, one of the administrators, and Monroe, about the time the latter purchased of Root. That Wheeler and Monroe came to Ann Arbor to see the lots, and while there, agreed Wheeler should have the choice of four lots for the third belonging to the estate of Samuel Wheeler deceased, and that the other twelve should belong to Monroe; and that, in consequence of such partition, Root deeded twelve sixteenths of the lots to Monroe, who conveyed twelve of the lots, or all except the four selected by the administrator, to Thayer. This parol partition is denied by the administrator, who has been examined as a witness by complainants. It is, however,

of no consequence whether a partition was or was not made, by Monroe and the administrator, except for the purpose of [*202] showing the mistake *under which the deeds from Root to Monroe, and from Monroe to Thayer, were executed. Charles Wheeler was appointed administrator in the State of Ohio. As such he had no control over, or interest in, the real or personal estate of the intestate in this State. Had he been appointed in our own State, he would have had no authority to make partition of the real estate of the intestate, which descends to the heir, and does not go to the administrator. If the personal estate is insufficient to pay the debts, the administrator may apply to the judge of probate for a license to sell the whole, or so much of the real estate as is necessary for that purpose. He has no other interest in the real estate of his intestate.

The infant heirs and the administrator appointed by the judge of probate of Washtenaw county, in this State, are defendants. The heirs have put in an answer, by their guardian *ad litem*, admitting the allegations of the bill, and the complainants contend they are entitled to a decree on such answer as against them. This is a mistake. No decree will be entered against an infant on a bill taken against him as confessed, or on the answer of his guardian *ad litem*, admitting the facts stated in the bill. The answer, in such case, is regarded as a pleading merely, and cannot be used as evidence for or against the infant, against whom the complainant must prove his case. *Mills* v. *Dennis*, 3 J. C. R. 367; *Bulkley* v. *Van Wyck*, 5 Paige R. 536; *Stephenson* v. *Stephenson*, 6 Paige R. 353.

The administrator, Lane, had obtained a license from the probate court of Washtenaw county, to sell the intestate's interest in the lots, when complainants filed their bill and obtained an injunction against the sale. By his answer, Lane denies that Root, in his lifetime, was seized of two undivided third parts of the lots, and Wheeler of but one undivided third part: [*203] and insists that Root and *Wheeler, under the deed to them from Belcher, were tenants in common, each of an undivided moiety. This brings up the question whether, in equity, real estate purchased by partners, with partnership

effects, is partnership property. At law, they hold it as tenants in common, and not as partners. It was so decided in *Cole* v. *Cole*, 15 J. R. 159, and *Goodwin* v. *Richardson*, 11 Mass R. 469. These decisions must be understood, however, as having reference to the legal estate, or interest of the parties in the land, and not to their equitable interest as partners. Between the heir and personal representative of a deceased partner, real estate so purchased has been held, in a number of cases in the English Court of Chancery, to descend to the heir. *Thornton* v. *Dixon*, 3 Bro. R. 199; *Bell* v. *Thayer*, 7 Ves. R. 453; *Balmain* v. *Shore*, 9 Ves. R. 500. But a contrary doctrine was held in *Townshend* v. *Devaynes*, 1 Mont. on Part., App. 96; *Smith* v. *Smith*, 1 Ves. R. 189; and *Ripley* v. *Waterworth*, 7 Ves. R. 425. And the better opinion is said to be, that equity will consider the person in whom the legal estate is vested, a trustee for the partnership, and distribute the property as personal estate. 3 Kent Com. 37; Col. on Part. 76; Gow. on Part. 52.

Whatever may be the rule in equity between the real and personal representative of a deceased partner, I think there can be no doubt that as between the partners themselves, real estate purchased by them with partnership effects, is partnership property, and, on the dissolution of the firm, should be divided as such, each taking that interest in it which he has in the personal property of the partnership; unless, at the time of making the purchase, it was understood to be an individual, and not a partnership transaction. A contrary doctrine would lead to manifest injustice, in case of insolvency of one of the partners, or where *their interest in the partnership was [*204] not equal, as is frequently the case. *Green* v. *Green*, 1 Ham. Ohio R. 535; *Sigourney* v. *Munday*, 7 Conn. R. 11.

Root having two shares to Wheeler's one in the partnership between them, was in equity the owner of two undivided third parts of the lots, when he conveyed to Monroe. And Monroe, supposing there had been a partition made of them between him and Charles Wheeler, intended to convey the whole of his interest to Thayer, when he deeded to him the twelve lots.

Thayer and his grantees, consequently, are entitled to Root's interest in the lots, which, at law, was an undivided half, but in equity, two equal undivided third parts. Can a decree be entered accordingly, based on the equitable rights of the parties? I should entertain no doubt on this point, if the bill were so framed as to present the equities of the parties under the deed from Belcher to Root and Wheeler. Partition may be decreed according to the equitable rights of the parties. *Coxe* v. *Smith*, 4 J. C. R. 271. But, to enable the Court to make such decree, the equitable rights of the parties should appear from the pleadings in the case. The bill, it is true, states the rights of Root and Wheeler to have been two-thirds and one-third, but it must be understood with regard to their legal, not their equitable rights. It does not as much so refer to the latter; for there is no mention made in any part of the bill, of the partnership of Root and Wheeler, the different interests of the partners, the purchase of the lots by them as partners, and the payment of the purchase money out of the partnership property, and the deed from Belcher to them as tenants in common. No one of these facts, out of which the equities of the parties arise, appears from the bill, or is put in issue by the pleadings. They are brought before the Court by the evidence in the cause, and make out a [*205] *case entirely different from that made out by the pleadings. The rule is, that the relief given must be consistent with the case made by the bill. *English* v. *Foxall*, 2 Pet. R. 595; *Wilkin* v. *Wilkin*, 1 J. C. R. 111; 13 Ves. R. 119; 3 Paige R. 478; 2 Paige R. 396. I cannot, therefore, decree a partition on the equitable rights of the parties; and to enter any other decree would be doing injustice to the complainants. The bill must be dismissed without costs, and with leave to complainants to file a new bill setting up their equitable rights, unless the administrator, Lane, without prejudice to his right to an appeal on the merits, will consent to a decree being entered, for a partition, according to the equitable rights of the parties, at complainants' expense.

A decree entered by consent of administrator.

*Mark Norris *v.* Timothy Showerman and [*206] Lewis S. Church.

In construing an instrument, the whole of it should be considered, and a construction of a detached part, without reference to the rest, is erroneous.[1]

An agreement by a lease in a memorandum signed by him at the foot of the lease, before it was assigned, constitutes a part of the lease.

Where equities are equal, and neither party has the legal title, or the legal title has been procured with a knowledge of the prior equity, the party who has the prior equity must prevail.[2]

Where water was leased in the following words: "The right and privilege of drawing from the west side of a race now making by the said party of the first part, in Ypsilanti aforesaid, and leading to his new saw-mill, at any place within sixteen rods from the head-gate of said race, as much water as will run through an aperture of two feet square, under a head of four feet from the top of said aperture," &c., *it was held* the words "under a head of four feet from the top of said aperture," must be construed as referring to the location of the aperture, and not to the quantity of water leased; and that the lessee was entitled to as much water as he could take through an aperture two feet square, made in the side of the race, not lower down than four feet below the surface of the water in the race; and not to as much water as would pass into space, through such an aperture, under a head of four feet above the top of the aperture.

The bill in this case was filed to obtain an admeasurement of water under the following lease:

"Article af agreement made and entered into this ninth day of June, in the year of our Lord one thousand eight hundred and thirty-two, between Mark Norris of Ypsilanti, county of Washtenaw and territory of Michigan, of the first part, and Alanson M. Hurd, of Detroit, in the territory aforesaid, of the second part, witnesseth: that the said party of the first part, for and in consideration of the covenants and agreements hereinafter contained to be performed and kept by the said party of the second part, doth hereby grant and convey to the said party of the second part, and to his heirs for fifty years,

[1] See *Bronson* v. *Green*, *ante*, 56 and note.

[2] See *Wing* v. *McDonald*, *ante*, 175.

[*207] and the *privilege of renewing this agreement for fifty years more, at the end of this term, the right and privilege of drawing from the west side of a race, now making by the said party of the first part, in Ypsilanti aforesaid, and leading to his new saw-mill, at any place within sixteen rods from the head-gate of said race, as much water as will run through an aperture of two feet square under a head of four feet from the top of said aperture, for the use of carrying machinery for iron works, provided so much shall be needed by the said party of the second part for such use, and also the right of erecting a bridge across said race and using the same. In consideration whereof, the said party of the second part hereby agrees to pay to the said party of the first part the sum of fifty dollars per year, payable annually on the ninth day of June, for the payment of which sum the said party of the second part hereby binds himself, his heirs, executors and administrators."

"It is hereby further agreed by and between the parties aforesaid, that in case two feet square of water should not be enough for the use of such iron works, as the said party of the second part may hereafter erect near said race, that he shall have as much more as may be necessary for such use by paying therefor, at the same rate as for the two feet square aforesaid. It is further agreed that in case a sufficient quantity of ore cannot conveniently be procured for carrying on said iron works to advantage, that the said two feet square of water may be used for such other machinery as the said party of the second part shall think fit and proper.

In witness whereof the said parties hereunto set their hands and seals the day and year first above written.

In presence of } *Mark Norris*, [L. S.]
E. M. Skinner. } *A. M. Hurd*, [L. S.]

[*208] *It is further agreed that the water is to be measured at the head-gates.

Witness present } *A. M. Hurd*, [L. S.]
E. M. Skinner. }

The lease, with the memorandum at the foot of it, was

recorded June 26th, 1834; and Hurd, May 22d, 1835, assigned one-half of the lease to James M. Edwards, Abel Godard, and Allen Stewart, and the other half to Morris Sage. The assignments referred to the lease as recorded; and the bill stated the defendants were, by assignment, the owners of the whole leasehold interest. It also stated that, after the lease was executed, it was agreed between complainant and Hurd the water should be taken from the dam, instead of the race leading to complainant's mill; and that, in consequence of such agreement, the water was taken by a flume from the dam, and the memorandum at the foot of the lease was made and signed by Hurd. That the flume had become old and leaky; that defendants had refused to repair it; that it permitted the water to waste; and that defendants used more water than they were entitled to under the lease, to the great injury of complainant's mill. That complainant notified them he wished to have the water measured, and, in December, 1838, gave them notice he would attend to assist in putting in a head-gate for that purpose, and, defendants refusing to attend, he put in a head-gate with an aperture two feet square in it for the water to pass through from the mill-pond into the flume, which head-gate Showerman soon after removed. That, in May, 1839, defendants still refusing to assist in putting in a head-gate, complainant caused a new head-gate, with an aperture as aforesaid to be fitted in, which Showerman also removed.

The bill prayed the defendants might be required, *under the direction of the Court, or some one to be ap- [*209] pointed for that purpose, to replace the head-gate so removed by them, and be enjoined from afterwards removing it.

The answer of Showerman admitted the lease and the recording thereof, but denied the memorandum at the foot was a part of it. Admitted the several assignments of the lease set forth in the bill, and stated the entire leasehold interest was in him, Church having assigned to him long before the bill was filed. Denied he had drawn more water than he was entitled to under the lease. Stated he had, from time to time, repaired the flume, and prevented, as far as was in his power, the waste of water by

leakage. That Hurd had sold his interest in the lease before he made the memorandum; that Hurd had no authority for making the memorandum at the foot of the lease; that complainant had frequently requested to have the water measured at the head-gate, but he had always insisted, and still insisted, it should be measured on the wheel, and not at the head-gate. Admitted complainant, in 1838, put in a head-gate with an aperture as stated in the bill, but that there was not a head of four feet over the aperture, and that he, with the assistance of others under his direction, removed the headgate put in. Made the like admission with regard to the head-gate put in, in May, 1839. Admitted the memorandum at the foot of the lease was made by Hurd before the lease was assigned by him, but that he had previously sold his interest in the lease, and given the purchasers the entire control of the property.

Many witnesses were examined as to the measurement of water, etc., and the bill was taken as confessed against Church.

Kingsley & Backus, for complainant.

Lane & Miles, for Showerman.

[*210] *The Chancellor. Many witnesses have been examined and much testimony has been taken in this cause, but it must turn altogether on the construction to be given to the agreement or lease.

Showerman insists he is entitled to as much water as will pass through an aperture two feet square, under a head of four feet above the top of the aperture, and with nothing below the aperture to obstruct the water in passing;—that is, the water, passing through the aperture, must not pass into, or be obstructed by dead water below.

The words of the lease, "as much water as will run through an aperture of two feet square, under a head of four feet from the top of said aperture," it is contended, refer to the quantity of water, merely, disconnected from the mode of taking it; and witnesses have been examined to show this is the true

construction of the lease. I cannot give such a construction to the instrument. Such could not have been the intention of the parties when the lease was drawn. The testimony of defendant's witnesses clearly shows to my mind the absurdity of the construction contended for. Ailes says he measured the water in the river on the 24th of August preceding his examination, and that it would take about ten-sixteenths of it, nearly two-thirds, to supply the quantity leased, measured as above stated. Braman, who gives the same construction to the lease, says defendant would have water enough, if rightly managed, to drive six or seven run of stone. It is evident, I think, from the lease itself, such a result could not have been intended, or anticipated by the parties, when the lease was executed. The water was leased for the purpose of carrying machinery for iron-works to be erected by the lessee; and it was to be taken from the side of the race leading from the mill-pond to complainant's saw-mill. It was not to be taken directly from the *pond, as it would, in all probability, have been, if [*211] the lessee was to have two-thirds of the whole water power of the river at that point. Besides, it is provided that, if the quantity leased should be insufficient for the use of the iron-works, the lessee should have as much more as might be necessary, paying at the same rate.

The error of the construction contended for, consists in not looking to the whole lease for the intention of the parties, but in selecting out a few words, and giving a construction to them, without reference to the connection in which they stand with other parts of the instrument. By the language of the lease, complainant granted to the lessee "the right and privilege of drawing from the west side of the mill-race, now making by the said party of the first part, in Ypsilanti aforesaid, and leading to his new saw-mill, at any place within sixty rods from the head-gate of said race, as much water as will run through an aperture of two feet square." Suppose the sentence ended here, would there be any doubt the parties meant the lessee should have as much water as would run through an aperture two feet square, made in the side of the race? It

seems to me there could be no difference of opinion on this point. But the sentence continues, "under a head of four feet from the top of said aperture, for the purpose of carrying machinery for iron-works." Now, this part of the sentence, when taken in connection with what precedes it, has reference more particularly to the mode of taking the water, than to the quantity to be taken. It refers to the location of the aperture in the side of the race, and limits the distance the top of the aperture may be placed below the surface of the water in the race, to four feet. The lessee is to have as much water as he can take through an aperture, two feet square, made in the side of the race, not lower down than four feet from the sur-
[*212] face *of the water in the race. This is what I understand by the words, "under a head of four feet from the top of said aperture," as used in the lease. It may be said the lessee, by taking the water in this way, would lose in part the benefit of the fall, or head. That is true; but it must be remembered he would draw a much larger quantity than he could with the same aperture placed on a level with the surface of the water in the race.

Other parts of the lease, I think, show pretty conclusively the water is to be taken through an aperture of two feet square. Thus, "in case *two feet square of water* should not be enough;"—"at the same rate as for the *two feet square aforesaid;*"—"that the said *two feet square of water* may be used," &c. The language in each of these cases refers to the size of the aperture through which the water is to be taken; and the lease provides for an increased quantity, should the water thus taken prove to be insufficient for the purposes contemplated by the lease.

Much was said, on the argument, about the memorandum made at the foot of the lease by Hurd, the lessee. I do not look upon the memorandum as of any importance, one way or the other, unless it be for the purpose of showing that the parties understood the lease as I understand it. By changing the place of taking the water from the race to the mill-pond, they did not increase or lessen the quantity to be taken, or change

the mode of taking it, except as to the place. Nothing of this kind would be implied, and the memorandum clearly shows nothing of the kind was intended.

But the memorandum is a part of the lease. It was made a part of it before the lease was assigned, which was on May 22d, 1835. Hurd had previously to this, it is true, agreed to assign one-half of the lease to Edwards, Godard, and Stuart, and the other half to Sage; but *neither of these [*213] parties had, at that time, a legal interest in the lease itself. They had, at most, but an equitable interest in the lease, which might have been enforced in this Court. Now, complainant had a still prior equity to have the water measured at the head-gate, under the parol agreement between him and Hurd, when the place of taking the water was changed from the race to the mill-pond. Both Alanson M. Hurd and Philo C. Hurd testify the measuring of the water at the head-gate was a part of this agreement. Hurd, then, did only what a court of equity would have compelled him to do, when he made and signed the memorandum at the foot of the lease. I am now taking it for granted the memorandum is a material part of the lease. Had the assignees of Hurd taken an assignment of the lease, without the memorandum at the foot of it, but with a knowledge of the agreement between Hurd and complainant, they would have taken it subject to complainant's equity to have the water measured at the head-gate. When equities are equal, and neither party has the legal title, or the legal title has been procured with a knowledge of the prior equity, the one who has the prior equity must prevail. *Grimstone* v. *Carter*, 3 Paige R. 436; *Wing* v. *McDowell* *ante* 175.

When complainant put in the head-gate, in December, 1838, and again in May, 1839, he made the aperture in the gate as far under the water as the defendant's flume would admit. If defendant wished the top of the aperture to be four feet under the water, when at high water mark, he should have lowered his flume for that purpose. He was altogether in the wrong, in removing the head-gates.

Bill dismissed against Church, without costs, and decree entered against Showerman, in accordance with the opinion of the Court.

[*214] *CHARLES G. HAMMOND, AUDITOR GENERAL, JOHN J. ADAM, STATE TREASURER, AND ROBERT P. ELDREDGE, SECRETARY OF STATE, *v.* THE PRESIDENT, DIRECTORS, AND COMPANY OF THE MICHIGAN STATE BANK, GEORGE F. PORTER AND JAMES F. JOY.

The commissioners appointed to settle with the Michigan State Bank, under the act of February 1, 1840, had no right to bind the State to pay any debts of the bank.

Where an agent, acting within the scope of his authority, does a thing which, standing alone and by itself, would be binding on his principal, and at the same time does something more, which he was not authorized to do, and the two are not so interwoven with each other that they cannot be separated, but constitute different parts of the same contract, that which the agent was authorized to do, is binding on his principal, and that only which he was not authorized to do, is void.[1]

A person who deals with an agent is bound to inquire into his authority, and ignorance of the extent of the agent's authority, is no excuse.[2]

To determine whether a bill is multifarious, we must look to the stating part of the bill, and not to the prayer alone; for, if, in his prayer for relief, complainant ask several things, to some of which he may be entitled, and to others not, the bill is not on that account multifarious, but he will, on the hearing, be entitled to that specific relief only, which is consistent with the case made in the stating part of the bill.[3]

Where the Michigan State Bank made an assignment to the commissioners appointed on behalf of the State to make a settlement with it, on condition that the State should indemnify and save harmless the bank from

[1] See Michigan State Bank *v.* Hastings, 1 Doug., 225; Michigan State Bank *v.* Hammond, id., 527.

[2] See Korneman *v.* Monaghan, 24 Mich., 36; Grover & Baker Sewing Machine Co. *v.* Polhemus, 34 id., 247.

[3] See Ingersoll *v.* Kirby, *ante*, 65.

certain liabilities, and the commissioners thereupon released the bank from all its liability to the State, and the State refused to accept the condition, (which the commissioners were not authorized to make,) and caused a bill to be filed to recover possession of a part of the property assigned, and for an account, and was demurred to, for want of equity, the demurrer was overruled; and it was *held* that the State acquired by the assignment, a right to the property, notwithstanding the rejection of the condition.[1]

DEMURRER to bill filed by complainants, as trustees for the State, under "an act to provide for the collection of certain assets transferred to the State, and for other purposes." Session Laws of 1842, page 110.

The bill states that the State of Michigan, previous to *the 26th of February, 1839, had deposited large sums [*215] of money for safe keeping in the Michigan State Bank, and that on that day the bank stopped payment, having in deposit, money belonging to the State, to the amount of six hundred thousand dollars, and upwards. That soon thereafter the bank proposed to settle with the State, and to turn out property in payment of the debt, and thereupon the legislature, by an act approved April 10th, 1839, (Session Laws of '39, page 73,) authorized the Secretary of State, Auditor General, and Andrew G. Hammond, as a committee on the part of the legislature, to settle with the bank for all deposits made with the bank by the State. That this committee did not effect a settlement, in consequence of the bank claiming to set off certain demands which the committee did not think themselves authorized to allow under the act. That, thereupon, the legislature passed a joint resolution, which was approved April 19 1839, entitled "A joint resolution of the Senate and House of Representatives to extend the time for settlement with the Michigan State Bank, and to increase the powers of the commissioners charged with that duty." By this resolution the Auditor General, Secretary of State and Jonathan Kearsley were appointed commissioners to settle with the bank, "upon such terms as they may deem equitable," with authority "to extend the time for the payment of the balances found to be

[1] Overruled on this point, by Michigan State Bank *v.* Hastings, 1 Doug., 225.

due from said bank to the State," &c. (Session Laws of '39, p. 262.) That the commissioners failed to make a settlement, and reported that fact, with their proceedings, to the Governor of the State, June 8th, 1839, and, on the fifteenth day of the same month, the Attorney General filed a bill in chancery against the bank, on the part of the State, and obtained an [*216] injunction. That the legislature afterwards passed *another act, approved February 1, 1840, which act is in these words:

"An act authorizing the Auditor General, the State Treasurer and the Secretary of State, (for the time being,) to settle with the Michigan State Bank."

"*Section* 1. Be it enacted by the Senate and House of Representatives of the State of Michigan, That Eurotas P. Hastings, Auditor General, Robert Stuart, Treasurer of the State, and the Secretary of State, (for the time being,) be, and they are hereby appointed commissioners on the part of the State to settle with the Michigan State Bank, upon such terms as they may deem equitable. The said commissioners are hereby authorized to give such time for the payment of the balances found to be due from the said bank to the State, as the ability of said bank to meet the said several balances may seem to require; and the said commissioners are hereby authorized to receive from said bank its bond or bonds, or other satisfactory security, conditioned for the payment of said balances at such times as may be agreed upon between said commissioners and the president and directors of said bank.

"2. The Treasurer of the State is hereby directed, on the payment of the balances so found due from said bank, to pass the same to the credit of the several funds to which they now stand due, in the proportions the said payments may bear to said several funds.

"3. In case the said bank shall fail to meet the payment of its bonds, as conditioned, the Auditor General shall be, and he is hereby directed to report such failure to the Attorney General, who shall thereupon proceed to collect from said bank and

its sureties, the amount which may be due, in the name of the State of Michigan.

"4. The persons hereby employed, shall have power to commute and receive an assignment of any of the *assets [*217] of the bank, which, in their opinion, shall be for the interest of the State."

On the first of May, thereafter, a settlement was made between the State, by its commissioners, and the bank, in the following words:

"This indenture, made this first day of May, in the year of our Lord one thousand eight hundred and forty, between the president, directors, and company of the Michigan State Bank, of the first part, and Eurotas P. Hastings, Auditor General, Robert Stuart, Treasurer, and Thomas Rowland, Secretary of the State of Michigan, commissioners for and on behalf of the State of Michigan, for the purpose of settling with the party of the first part, parties of the second part, witnesseth:

"That the party of the first part, for the purpose aforesaid, doth hereby assign, transfer, and set over to the parties of the second part, all the beneficial interest of the party of the first part, in and to all the property, effects, notes, accounts, real estate, mortgage securities, and choses in action, contained in schedule marked A, hereunto annexed, with all the rights, privileges and appurtenances thereunto belonging, and with all the collateral securities by the party of the first part, held, for and on account of them or any of them, in full payment and satisfaction of all debts and liabilities of the party of the first part, to the State of Michigan; subject, nevertheless, to all and any discrepancies in the accounts and demands, arising from errors or contingent claims, and also subject to all just charges of counsel and expenses heretofore accrued and hereafter to accrue, upon such as are in process of collection at law, or in chancery: and the party of the first part doth hereby authorize, constitute and appoint the parties of the second part, and each of them, their successors and assigns, or such other person as may be *appointed by the legislature, the attorneys [*218] of the party of the first part, to sell, convey, alien, lease,

assign, collect, secure, commute and compromise, all and singular, the property and demands in said schedule described, in their own names, or in that of the party of the first part, but at their own proper costs and charges, and all deeds, leases, and acquittances to give, necessary in the premises, hereby ratifying and confirming all their lawful acts and doings in the matters aforesaid. And the party of the first part hereby covenant and agree, to and with the parties of the second part, that it will grant to the said parties of the second part, their agent or attorney, at all reasonable times, access to such books and papers connected with the property and demands mentioned in said schedule A, as are or may be in its possession, and as shall and may be necessary, and to furnish all such information, from time to time, to the parties of the second part, as they may desire, and the party of the first part, or its officers, may be possessed of or knowing to, in the premises.

"And the parties of the second part, by virtue of the authority vested in them, by "an act entitled 'an act authorizing the Auditor General, the State Treasurer, and the Secretary of State, for the time being, to settle with the Michigan State Bank,' approved February 1st, A. D. 1840," and by an act entitled "an act in relation to the Michigan State Bank," approved March 28th, 1840, do hereby, in consideration of the conveyance, covenants and stipulations of the party of the first part, hereinbefore set forth, fully acquit and discharge the said party of the first part from all claims, debts, dues and demands against the said party of the first part, and in favor of the State of Michigan, and from all liability thereon, or on account of the premises, to the State of Michigan aforesaid.

"And it is hereby understood by and between the [*219] *parties of the first and second part, that the assignments of the property and effects contained in schedule A, is made upon and subject to the express condition that the State of Michigan shall indemnify and save harmless the party of the first part, and their grantors, immediate and remote, from and against the several claims and liabilities hereinafter specified, forever, viz: A certain bond and mortgage, executed

by the party of the first part, to the Bank of Michigan, upon their banking house and lot, this day conveyed by the party of the first part to the Auditor General, subject to said mortgage, upon which there remains unpaid the principal sum of $11,250; also, a certain bond and mortgage, executed by Lansing B. Mizner to James H. Wood, dated October 19th, A. D. 1838, on a house and lot this day conveyed by the party of the first part to the Auditor General, subject to said mortgage, upon which the principal sum of $1,500 remains unpaid; also, a certain bond and mortgage, executed by Eurotas P. Hastings to William W. Miller, upon lots eight, nine, fifty-four and fifty-five, in section four, in the city of Detroit, this day conveyed by the party of the first part to the Auditor General, upon which the principal sum of $10,000 remains unpaid; also, all and sundry claims by and in favor of attorneys and agents, for professional services and disbursements, in and about the collection and securing of all or any of the demands set forth in said schedule A, which have accrued or may hereafter accrue, upon any collateral securities which are transferred to the State of Michigan, and more particularly set forth in schedule marked B, hereunto annexed. In testimony whereof," &c.

The bill further states, that the property assigned was delivered over to the Auditor General, for the State, and the injunction against the bank was dissolved with the assent of the Attorney General, given in consequence of the *settlement. That many of the demands, when the [*220] assignment was made, were in possession of the defendants, Joy & Porter, attorneys for the bank, for prosecution and collection, and that they were employed by the Auditor General to continue the prosecution and collection of such demands for the State. That, by an act of the legislature, approved February 17, 1842, the complainants were constituted trustees on behalf of the State, to take charge of the property so assigned, &c., and the settlement with the bank was ratified, except, in the language of the act, "so much thereof as purports to bind the State to make any indemnities to the said Michigan

State Bank, and so much as purports to bind the State to the payment or advancement of money, whether for the purpose of discharging incumbrances, paying costs, or for any other purpose whatever, which portions are hereby, on the part of the State, expressly rejected." That, on or about the 7th of March, 1842, the complainants, Adam and Eldredge, applied to Joy & Porter for a statement of the situation of the assets in their hands, which they refused to give. That complainants believed they had not properly conducted the business entrusted to them, as attorneys for the State; that, while so employed, they were also employed by the bank, adversely to the interest of the State; that, on or about the 12th of March, 1842, and while they were professing to act as attorneys for the State, the president, directors and company of the bank, filed a bill in this Court against the said Eurotas P. Pastings, late Auditor General, to enjoin him from parting with the said assets and assigned property, to any officer or trustee appointed by the State to take charge thereof, and praying that he might be deemed, adjudged and declared a trustee for the bank, and that said Joy was counsel for the bank, and signed said bill as such, and that said bill was verified by the oath of said Porter, as president of the bank.

[*221] *That, on the 4th of May, 1842, complainants addressed to Joy & Porter the following letter:

"Detroit, May 4, 1842.

"Messrs. Joy & Porter:

"Gentlemen—On the 14th day of March last, the Auditor General, Secretary of State, and State Treasurer, addressed you a note, requesting you to furnish them (as trustees, &c.) a statement of the assets in your hands, as attorneys, belonging to the State of Michigan, which were assigned to the State by the Michigan State Bank, together with an account, (among other things,) of your professional charges on the same. Your reply thereto is entirely unsatisfactory. We cannot recognize Eurotas P. Hastings, Esq., late Auditor General, as your client in relation to said assets at this time. By the assignment of the Michigan State Bank, the said assets became the property of

the State, and the successor of Mr. Hastings succeeded to all the rights to possess and control the same, which Mr. Hastings, as a State officer, ever had.

"The act of the legislature, approved February 17th, 1842, constituted the Auditor General, State Treasurer, and Secretary of State, trustees to take charge of said assets.

"As such trustees, we do hereby demand that you deliver up to us, immediately on the receipt of this, all said assets now in your hands, all moneys you have collected on the same, and all mortgages, deeds, or other evidences of debt connected with, or growing out of said assets. We hereby furnish you with a schedule of the demands, notes, and accounts left with you, which were assigned to the State, and for which the State holds you personally responsible. You are also notified that your power, as attorneys over said assets, is hereby revoked; and that, hereafter, *any action of yours in relation to [*222] said assets, will not be sanctioned by the State. The revocation of your powers as attorneys in the premises, render it necessary that you forthwith account to us as such trustees, for said assets, and all moneys you may have collected or received on the same, as well as any and all securities you may have taken in the collection of any portion of said assets. A continued refusal on your part, to account to us as said trustees for said assets, and for the moneys you may have collected on the same, will be considered by us a breach of your professional duties, and impose upon us the unpleasant duty of applying to the laws and the courts for the proper redress.

"Hoping that you may, on reflection, be induced to act in the premises pursuant to law, and in accordance with the rules which subsist between attorneys and clients,

"We are, respectfully,

"Your obedient servants,

"C. G. Hammond,
"*Auditor General*,
"J. J. Adam,
"*State Treasurer*,
"R. P. Eldredge,
"*Secretary of State*,
} *Trustees.*"

211

That, on the seventh of the same month, complainants received from Joy & Porter an answer, dated on the fourth of May, from which the following is an extract:

"Detroit, May 4, 1842.

"Gentlemen—We have your letter of to-day, enclosing a schedule of papers which you supposed to be in our office for collection, for the benefit of the State, as the assignee of the Michigan State Bank. With regard to that schedule, we may remark that most of the papers therein mentioned, were [*223] never in our office, or in any way subject *to our control or supervision. With regard to those which were actually placed in our hands by the State Bank, (and none of these papers were placed in our hands by any one else.) we have to say that, in the present position of the controversy between that bank and the State, we cannot, with safety to ourselves as individuals, nor with propriety as professional men, place them in your control.

"The bank does not recognize your right to take possession of these assets. It does not recognize the right or the power of the legislature to say that its property shall be taken from it and appropriated to public use, without a compensation. Nor does it choose to submit to arbitrary, unjust, and oppressive acts of legislation, which break down all the barriers of private right, and subjects, (if the legislature possesses the power which it has attempted to exercise in this instance,) all the private property of all the citizens of the State, to the mere will of the legislature, without control or possibility of procuring any redress. It will not voluntarily submit to be deprived of its property, by the State, in violation of its rights, and in open violation of express stipulations and conditions, and of the universal right guaranteed by the great fundamental principles of our government, to all who enjoy its protection, to acquire and be protected in the possession and enjoyment of their private property. The assignment to which you allude, conveyed these and other assets to the commissioners appointed by the State, *upon and subject to an express condition* to be performed by

the State. Upon the performance of that condition, the State would, of course, acquire an absolute right to the property. And it is equally clear, that, if the State refused to perform the condition, it must forfeit all right and title in and to the property so assigned.

"In our view, it requires no very great astuteness of *mind, or clearness of perception, to see this consequence. [*224] Now, the State has refused to fulfill and perform the condition, upon the performance of which alone, it might acquire the right to take possession of, and control the property, and yet, by an act of legislation, endeavors to seize it, in fraud of the rights of the bank, in violation of law, and of the most cherished principles of our institutions, and of civil right and liberty. Under these circumstances, you will excuse us if we cannot see, (as you do so clearly,) that these assets have become the property of the State, and that you have succeeded, as State officers, to the right to the possession and control of them.

"We shall very cheerfully render, for the present, an account to the individual, (Mr. Hastings,) who is entitled to it, and we shall as cheerfully render you an account of our doings in the premises when it shall be ultimately decided that you have a right to it. At present the whole matter is involved in the suit now pending, relative to this settlement, and by no means yet determined. And, for your information, we may remark that a transaction of this nature, on the part of the State, in open and utter disregard of private rights, and of the protection which is due from the government to these rights, resulting, in fact, in a confiscation of property, without a trial by Court or jury, cannot take place, pass by, be acquiesced in by us as counsel for the State bank, as one, where no remedy can be had but silence; no relief, but such as those enjoy, who tamely submit to arbitrary power," &c.

The bill further states, that the bank claims the property and effects assigned to the State to be the property of the bank, and that Joy & Porter claim to hold the assets placed in their hands by the State as attorneys for the bank, and prays that the bank may be decreed specifically to perform the agreement,

[*225] and that the bank, and Joy & *Porter may render an account of all and singular, the property, assets, demands, and effects in their possession, or under their control, and that an account may be taken of all moneys received by them on account of said claims and demands, &c., and that, if the Court should be of opinion the settlement between the bank and State is not binding, then, that the bank may be decreed to account to complainants for what is due from it to the State, and for other or further relief.

The demurrer to the bill is general, specifying no special cause.

Joy & Porter, in support of the demurrer.

Upon the state of facts mentioned in the bill, what is this case?

First. It is an assignment upon a condition express, and the property, by the terms of the assignment, was conveyed to Hastings and others, subject to, and upon, the express condition that the State of Michigan should do certain acts, which it now refuses positively to do. And yet, with a positive and absolute refusal to perform the condition, this bill is filed against the State Bank, and its counsel, to procure possession of the property, which complainants are entitled to only upon the performance of the condition. Have they a right to the possession of the property? In cases of this nature, the right of property, or possession of the property, is dependent upon the performance of the conditions. 2 Kent Com. 497; 2 Pick. R. 515; 2 Barn. & Ald. 330; 2 Hill R. 327; 6 J. C. R. 438; 19 Ves. R. 235; 4 Mass. R. 294, &c.

Here, then, it is clear that these complainants, or the State, on general principles, have no right to touch a dollar of this property, having refused to fulfill the conditions. [*226] *And the bank may replevy from them all the personal property they held, and eject them from all the real estate.

For the nature of the condition, see Cruise Dig. Tit. 13, Ch.

1, Sec. 9, 10, 17, 18; Ch. 2, Sec. 39, 49, 55–57. Sheph. Touchst. 119–126, &c. And a condition binds the King, as well as others; there is no exception. If the condition be not fulfilled, this Court will, in a proper case, decree a reconveyance. Cruise Dig. Tit. 13, Ch. 2, Sec. 39. And nothing will excuse the performance of the condition, except impossibility, the act of God, &c. Sheph. Touchst. 132, 157; 10 J. R. 27.

Here, then, upon every principle of right, of law, of equity and common sense;—upon every principle except that of arbitrary power;—we have a right to a decree in this Court, that the property be reconveyed to us. Then how can they ask that this Court shall assist in carrying out their nefarious designs?

But a law has been passed, directing these complainants to take this property, convert it, and pay with the proceeds State scrip, &c. Under this act the complainants claim. Laws 1840, p. 9, 128; Laws 1842, p. 110. Now, what is the character of this act? Is it valid, or void? Had the State a right to pass it?

It is void for several reasons. It is an act of gross tyranny. It rejects the condition, and thereby rejects the property, and yet seizes it. It is a seizure of private property for the redemption of State scrip, without judge, jury, or law -without any estimation of value,—without any compensation,—without any State necessity, without any justification whatever. This will appear, if we reflect upon the rights of the parties. The State has no right to pass such a law. 1 Pet. Cond. R. 173–5. 2 Pet. R. 656. 3 Story Com. on Const. 661, &c.

But again, this act is in violation of the second article *of the ordinance of 1787, which says that no person [*227] shall be deprived of life, liberty, or property, without due process of law; and is, for that reason, void.

What is due process of law? It means law in its regular course of administration, through courts of justice. 3 Story Com. on Const. 264, 661; 2 Dal. R. 312; 9 Gill & J. 412; 1 Bl. Com. 139 *et seq.* This property, therefore, seized under this act, is not seized by process, or due process of law, at all.

It is void for another reason, and that is, that it is in contravention of article 3, of the constitution of the State of Michigan, which separates legislative, judicial, and executive powers. Now, here is a question of law, as to the rights of the parties, under this assignment, subject to this condition, which ought to have been left to the judicial tribunals of the country, where parties could be heard, and their rights adjudicated upon. Instead of this, the legislative power adjudicates, condemns and executes, without a chance of hearing on the other side.

Besides, this law violates the contract made by the State Bank with the commissioners, and is therefore void, under the clause of the constitution which forbids any State to pass any law impairing the obligation of contracts. The act, in fact, alters the contract, and makes that which was conditional, absolute. Suppose an act should be passed, making all estates conveyed to the State or its commissioners, heretofore, or to any other individual, (for the principle is the same,) upon condition, absolute and not subject to condition; who will pretend that such a law would be constitutional? And, if a general law would not be, how can a law which affects but a single case be constitutional?

Let it not be said that the State had a large debt against the bank, and takes this means to collect it. The State [*228] *has the same process of law for the collection of debts, as citizens. Courts are open to it; it may sue, and by *due process of law* it may collect what is due to it. But can the legislature adjudicate upon the amount which is due, try the case *ex-parte*, condemn, issue process, and seize the property, &c.?

This act of the legislature, therefore, can give no rights. It is a void act, and will not justify those who act under it. They may be sued in trover, trespass, ejectment, and for mesne profits. 5. Pet. Cond. R. 743; 18 Pick. R. 502; 12 Mass. R. 468; 7 Mass. R. 394; 11 Mass. R. 401.

But, upon the general principles upon which this Court acts, these parties are entitled to no relief; their bill must be dismissed. They come here, alleging their own violent and

arbitrary action, and pray for relief which they are entitled to, upon their own showing, only in consequence of their own wrong, and violent and oppressive action. They must do equity before they can have equity,—they must fulfill this condition, and then they will have no need to come in here, and ask this Court to become the handmaid of their iniquity.

Multifariousness.

But this bill, even supposing the strange legal positions taken by the complainants, to be true, ought to be dismissed. It is multifarious. It unites two distinct defendants, on distinct grounds, for distinct causes of action. Either the State has a right to all the papers in the hands of Joy & Porter, or it has not. It is a question of legal right solely, and to procure an account from Joy & Porter, of matters in their hands belonging to the State, the bill should have been filed against them unmixed with any thing else. Suppose this Court should determine that this bill cannot be maintained against them, what earthly connection have they with the alternative prayer against the *bank? If this bill can be maintained against Joy & [*229] Porter, it must be upon the ground that there is a complete and final settlement with the bank, by which the property passed to the State. If it did so pass, then Joy & Porter, holding State property, are alone liable, and there must be a decree against them alone. There can be no decree against the bank upon this basis. But a decree is asked against the bank, if this Court is of opinion that the settlement made by the State commissioners with the bank, is not binding and final upon the State, i. e. if this settlement is good and binding, then give us a decree against Joy & Porter for an account; if it be not binding, then give us a decree against the State Bank. This is very clear, for the averments in the bill show that, in one aspect of the case, they can have a decree against Joy & Porter alone. In folios fifty, fifty-one, and fifty-two, it is averred that the bank has completely fulfilled all its stipulations, and delivered all the assets, property, &c., to the commissioners. The bank has specifically performed, and yet they ask a

specific performance of the agreement. They have no right to ask a decree against the bank, according to their own showing, in this aspect of the case. They certainly have no right to ask one in the other aspect of the case, because the bank is released under the settlement. The commissioners executed a release, and that part of the contract is sanctioned by the legislature. Laws of 1842, p. 110.

Van Dyke & Harrington, contra.

I. The first question that arises in this case is, have the complainants any such interest in, or control over the property which forms the subject matter of this suit, as will authorize them to take or hold the possession of the same?

The complainants claim the right to the property under [*230] *the provisions of the act entitled "an act to provide for the collection of certain assets transferred to the State, and for other purposes," approved February 17th, 1842, by which act they are "constituted trustees in behalf of the State, to take charge of the assets assigned to the State, by the Michigan State Bank."

It appears by the bill in this case, that commissioners were appointed by an act of the legislature, in 1840, for, and on behalf of the State of Michigan, to settle with the Michigan State Bank, and that the property which forms the subject matter of this suit, was *conveyed and delivered* to the commissioners acting on behalf of the State, by the bank, under the agreement of May 1st, 1840, between the president, directors, and company of the Michigan State Bank, and Eurotas P. Hastings, Auditor General, Robert Stuart, Treasurer, and Thomas Rowland, Secretary of the State of Michigan, acting for and on behalf of the State.

If, therefore, the property passed to the State, by virtue of the settlement, conveyance, assignment, and delivery, there can be no doubt that the complainants, who have been appointed by an act of the legislature, trustees to take charge of that very property, for and on behalf of the State, have a right to its possession, management, and control.

It is contended on the part of the defendants, that the State has never complied with the condition of the agreement, but, on the contrary, that it has, by the second section of the act of February 17th, expressly rejected the condition, and thereby repudiated the acts of the commissioners and rescinded the agreement. Suppose this to be the case, the State has an unquestionable right to hold on to the property of an insolvent debtor which is in its possession, and to appoint trustees or receivers to take charge *of it, and appropriate and apply sufficient to pay the [*231] debt. This is a legitimate act of sovereignty, not abridged or controlled by the constitution. It is not taking private property for public use without just compensation, but is merely the assertion of a right, on the part of the State, of priority of payment out of the assets of an insolvent debtor, which are in the possession of the State. Congress have always claimed the right to pass laws to give the United States priority of payment out of the property of insolvent debtors, and those laws have, in all cases, been declared constitutional. 1 Kent Com., (2d ed.) 243 to 246. As to the power of the State to pass the act of February 17th, see Serg. Const. Law, 357, *et seq.*

II. The State has a right to the property under the settlement and agreement entered into by and between the commissioners on behalf of the State and the Michigan State Bank, without performing the condition attached to that agreement.

The commissioners exceeded their authority in attaching the condition, and it never was obligatory upon the State.

The extent of the obligation of that agreement depends,

1st. Upon the authority, and,

2d. Upon the power of the commissioners.

1st. As to the authority of the commissioners. The authority of the commissioners was derived wholly and entirely from the act of February 1, 1840. It was a *special* and *limited* authority to do a *specified* and *particular* act, viz: "To settle with the Michigan State Bank on such terms as they might

deem equitable." They were authorized to *receive an assignment* of the assets of the bank, but the act gave them no power or authority to bind the State to *indemnify* or pay *money*. A special authority must be strictly pursued in order to [*232] bind the principal. *Even in case of agencies, if the authority of agent purports to be derived from a written instrument, the party dealing with the agent ought to call for and examine the instrument itself, to see whether it justifies the act of the agent; and if, from his omission to examine, he should encounter a loss from the defective authority of the agent, it is properly attributable to his own fault. Story on Agency, 69; *Atwood* v. *Munnings*, 7 B. & Cres. 278; *Willington* v. *Herring*, 5 Bing. R. 442; 1 Pet. R. 264, 290; 1 Chitty on Cont. 174, 177; *Snow* v. *Perry*, 9 Pick. R. 542; *Lee* v. *Monroe*, 2 Pet. Cond. R. 531, *and note at the end of the case;* 13 Pet. Abr. 508. And the case is much stronger where commissioners are appointed by, and derive their authority from, a special act of the legislature. *Denning* v. *Smith*, 3 J. C. R. 344.

Here the agreement was entered into by the commissioners, as appears upon the face of it, "by virtue of the authority vested in them by an act entitled an act authorizing the Auditor General," &c., "to settle with the Michigan State Bank," &c. The authority under which the commissioners acted, therefore, is not only *presumed* to be within the knowledge of the party with whom they contracted, but it is referred to in the agreement itself, and the contract is made by both parties in reference to the authority contained in the act appointing the commissioners.

2. As to the *power* of the commissioners to bind the State to *indemnify* and pay *money*.

A power may be given by deed, by will, or by act of Parliament. Sugd. on Powers, 1; Paley on Agency, by Lloyd, 191. In construing the extent of a power, the intention of the parties must be the guide. Ibid, 459; 2 Cow. R. 233.

What was the intention of the legislature, when they [*233] *passed the act authorizing the settlement? Was it

their intention, when they appointed commissioners and gave them authority and power to settle with an insolvent debtor, upon such terms as they might deem *equitable*, that those commissioners should be at liberty to bind the State *to indemnify* and pay *money* to an unlimited extent? This is contrary to common sense, and to all rules of construction.

It is contended on the part of the defendants, that the act authorizing the settlement gave the commissioners full *discretionary* power to what they might deem *equitable* in the premises, and the commissioners having deemed it *equitable* that the State should make the *indemnities* and *payments* specified in the condition annexed to the agreement, it is legally bound so to do.

Where a *discretionary* power is given, it means that a *legal* discretion is to be exercised, not a wild arbitrary and capricious discretion, which has neither law nor reason to control it. It must be a sound discretion, exercised upon a view of all the circumstances, to render it a legal discretion. 6 J. C. R. 222; 1 Harr. Ch. R. 126; Story on Agency, 67.

But, how came this word *equitable* to be used in the act?

April 10, 1839, an act was passed (see act No. 44,) appointing commissioners, and authorizing them to settle with the Michigan State Bank. April 12, 1839, the commissioners report, (see House Doc. 925, No. 51,) that the bank claims an *equitable* offset against the demand of the State, for money advanced to State officers to the amount $50,000. The allowance of which the commissioners thought was not legitimately within the scope of their power and duties, under the act by which they were appointed. The committee "suggest in their report, (page 930,) for the consideration of the legislature, that the *question of settlement depends upon the justice or [*234] *equity* of the claims of the bank against the State, and becomes in a measure a matter of expediency, &c., and they ask the legislature to settle the matter, whether these claims shall be allowed or not."

Upon this report being made to the legislature, they passed a joint resolution April 19th, 1839, (see resolution No. 29,) ap-

pointing "commissioners to settle with the Michigan State Bank, upon such terms as they may deem *equitable*."

No settlement was effected by the commissioners appointed by this resolution, and, February 1st, 1840, act No. 8 was passed, adopting the language of this resolution. This is the way this word *equitable* comes to be used in the act. It was intended merely to give the commissioners power to allow the bank, on the settlement, these *equitable* offsets against the State, and nothing more; and this all appears from the public, and published acts, resolutions, and documents of the legislature, and, being public acts and documents, all parties were bound to take notice of them.

III. If the commissioners exceeded their power and authority in attempting to bind the State to *indemnify* and pay *money*, then is the agreement void *in toto*, or is only so much void as exceeds the power and authority given them by the act.

In construing the contract or agreement, and ascertaining how far it is obligatory upon the State, it is proper to attend as well to the character of the commissioners, as the terms of the contract. The commissioners in this case were appointed by a public act, to discharge a public trust, for a public benefit. See 17 Eng. Com. Law R. 328. And, so far as they acted legitimately, and within the scope of their authority [*235] under the powers conferred, *effect ought to be given to the agreement, and no further. The power and authority under which they acted, was special and limited. "An agent, constituted for a particular purpose, and under a limited power, cannot bind his principal if he exceeds his power. The special authority must be strictly pursued. Whoever deals with an agent constituted for a special purpose, deals at his peril when the agent passes the precise limit of his power. 2 Kent Com. 620; Story on Agency, 69, 77. And it is a well settled principle in the construction of powers, that where there is a complete execution of a power, and something more is added which is improper, the execution is good, and the excess only is void. Co. Litt. 258, a; 4 Cruise Dig. 216, Sec. 45; Id. 218, Sec. 49-

50; *Warner* v. *Howell*, 3 Wash. C. C. R. 12. See also *Griffith* v. *Harrison*, 4 T. R. 744.

This rule applies as well to agents acting under special authority, as to persons executing a power. Story on Agency, 156, 160; 2 Kent Com., 617-618; *State of Illinois* v. *Delafield*, 8 Paige R. 527; S. C. on Appeal, 2 Hill R. 155.

In *Nixon* v. *Hyserutt*, 5 J. R. 58, where an agent was authorized to sell and convey to the purchaser, in fee, as should be needful or necessary, according to the *judgment of the agent*, and the agent executed a conveyance with covenant of *seizin*, it was held the principal was not bound by the covenant of *seizin*, but the *legality* of the *conveyance* was not questioned. 7 J. R. 390; Chitty on Contr. 171, (n. 1;) 6 Cow. R. 354.

In this case the bounds between the proper execution of the trust and the excess, are clear and distinct.

The agreement is perfect and complete without the condition annexed, and the condition not being warranted by the authority given to the commissioners, is not obligatory upon the State, but is void absolutely without any *action on [*236] the part of the State, but the State has also expressly rejected the condition by a public act. See act of February 17, 1842, Sec. 2.

If then the State is not bound to execute and carry into effect the entire agreement as executed by the commissioners, and has expressly refused so to do, is that agreement to be considered as abandoned *in toto* and rescinded, or can it be enforced by the State to the extent of the authority and powers of the commissioners?

It is contended by the defendants that the rejected part annexed to the agreement is a *condition precedent*, and having been rejected, the whole agreement is rescinded. The answer to this is,

First. That condition was *void*, absolutely from the beginning, and therefore never formed any part of the agreement.

Second. It is not a condition precedent. A condition precedent is an act to be performed by the plaintiff before the defendant's liability is to accrue under his contract. Chitty on

Contr. 570. That part of the agreement which is called the condition, after providing that the State shall pay certain mortgages, &c., proceeds, "Also all and sundry claims by and in favor of attorneys and agents for professional services and disbursements, in and about the collection and security of all or any of the demands set forth in said schedule A, which have accrued or *may hereafter accrue, upon any collateral* securities which are transferred to the State of Michigan," &c. How are these payments to be made before these services are to be performed, or before it is possible to know what amount of services are to be performed, or what they would amount to?

But suppose it to have been originally a condition precedent and binding and obligatory on the State, the parties [*237] *now claiming the benefit of that condition have waived it by their own act.

It appears by the bill filed in this case, (and which, upon the demurrer must be taken to be true,) that, on the execution of the agreement, the property and effects assigned and conveyed, were delivered over to the State, and have since been held by the State or its officers appointed to take charge of the same.

A party, to avail himself of a condition precedent, who waives its performance and proceeds to fulfil the contract on his part, is estopped from relying on the condition precedent. *Betts* v. *Perrin*, 14 Wend. R., 219.

IV. This is not an *executory*, but an *executed* contract. The property assigned and conveyed has been delivered over to the State, and a portion of it appropriated and disposed of by the State; the suit against the bank was discontinued, and the injunction dissolved, and the commissioners gave the bank a full release and discharge.

If, therefore, the condition is of any obligatory force, it is only as an *independent* covenant, and the defendants cannot, in any event, avail themselves of that covenant, in this suit, as a defense, except they allege and show the *insolvency* of the State, a thing which is legally impossible. See *Tippets* v. *Walker*, 4 Mass. R. 597.

V. The bill is not multifarious.

A complainant is not permitted to demand several distinct matters of distinct natures, against several defendants; nor can several complainants demand, by one bill, several matters perfectly distinct and unconnected, against one defendant, nor join separate demands against the same defendant. But, where one general right is claimed by the bill, though the defendants have separate and distinct rights, an objection for multifariousness cannot be maintained. See *Terrill* v. *Craig*, Halst. Dig. 168.

*A bill which sets up only one sufficient ground for [*238] equitable relief, is not rendered multifarious by the insertion therein, of a separate and distinct claim, upon which the complainant is not entitled to ask for either discovery or relief. The complainant may join in the same bill, two good causes of complaint, arising out of the same transaction, where all the defendants are interested in the same claim of right, and where the relief asked for, as to each, is of the same nature. *Varick* v. *Smith*, 5 Paige R. 137.

The object of the bill in this case is to reach the assets of the Michigan State Bank, assigned to, and taken possession of, by the State. The bill states that Porter is the president of the bank, and Joy and Porter are attorneys for the bank; that they received the assets in their hands from the State, for collection, and that they now claim to hold the same as attorneys for the bank. The bank is a proper and necessary party, for it claims the right to the assets. The bill prays for an account as against Joy & Porter, and for a receiver and account as against the bank, and for general relief; either or all of which the complainants are entitled to, if a sufficient case is made in the stating part of the bill. 1 Hoff. Ch. Pr. 49 and notes 1 and 2; *Ludlow* v. *Limon*, 2 Caine's Ca. 1, 39, 52, 53.

The Chancellor. By the act of 17th February, 1842, the legislature ratified the settlement made between the bank and the commissioners appointed by the State, except so much of it as purports to bind the State to pay certain debts of the

bank, or debts for which the bank is liable, which the act repudiates.

In disposing of the demurrer, it will be necessary, therefore, to decide whether the commissioners were authorized by the act of February 1st, 1840, under which they acted, to [*239] bind the State to pay these debts? If not, *then, whether the legislature could confirm in part, and refuse to confirm in part, what the agent of the State had done, by ratifying what they were authorized to do, and rejecting what they were not authorized to do; or was the State bound to ratify or reject the whole settlement?

I think it clear that the commissioners exceeded their powers in attempting to bind the State to pay these debts. They were authorized to commute, and receive an assignment of any of the assets of the bank, but not to contract for the payment of the debts of the bank, by the State. There is a manifest difference between taking an assignment of a piece of property subject to a lien, and an agreement on the part of the assignee to pay the debt; in the one case he would be personally liable for the payment of the debt, although the thing assigned might not be worth the half of it, while, in the other, he would at most but lose the property on which the debt was a lien. There is nothing in the act, express or implied, conferring this power on the commissioners. They might, with as great show of authority, have taken an assignment of all the assets of the bank, and have agreed the State should pay all its debts. In what do the cases differ? Not in the power, but in the extent of its execution only.

The word "equitable," in the first section of the act, it has been insisted, would warrant a more liberal construction of the powers of the commissioners. I cannot think so. There is no connection, as I can discover, between it and the power given by the fourth section of the act. It is to be found only in the first section of the act, where it is used in connection with the powers mentioned in that section; which are, 1st, to settle with the bank; 2d, to give such time for the payment of the *balances* found to be due to the State, as the ability of the bank might

seem to require, and to take security for their payment. It is in *connection with the first of these powers the [*240] word "*equitable*" is used. The words of the act are, "commissioners on the part of the State to settle with the Michigan State Bank, upon such terms as they may deem *equitable*." It has reference to the adjustment or settlement of the "balances" due from the bank to the State, and was intended to authorize the commissioners, in making up such balances, to allow all equitable claims or set-offs the bank might have against the State. This is what is meant by the word "equitable," in the first section of the act. If we look for its meaning into the previous legislation that had been had with a view to a settlement with the bank, we shall come to the same conclusion. The first act on the subject was the act of April 10, 1839. This act authorized the "committee" to settle with the bank for all deposits made with it by the State. The word equitable is not in it. The committee afterwards reported to the legislature they could not settle with the bank, because it insisted on having certain demands set off against what it was owing the State, which the committee did not feel authorized to allow, under the law appointing them. Thereupon, the joint resolution of the 19th April, 1839, extending the time for making the settlement, and increasing the powers of the commissioners, was passed. By this resolution the commissioners were authorized to settle with the bank "upon such terms as they might deem *equitable*." The same language is used in the act of February 1st, 1840, the first three sections of which, with some slight verbal alterations, in no way affecting the powers of the commissioners, are a transcript of the joint resolution of the 19th of April, preceding. Whether, therefore, we look to the act itself for the power of the commissioners, or to the course of legislation on the subject of *the settle- [*241] ment with the bank, the conclusion at which we arrive is the same.

"All written powers," says Mr. Lloyd, "such as letters of attorney, or letters of instruction, receive a strict interpretation; the authority never being extended beyond that which

is given in terms, or is absolutely necessary for carrying the authority so given into effect." Paley on Agency, by Lloyd, 192 ; *Atwood* v. *Munnings*, 7 B. & C. 278. Story's Agency, 66, sec. 68.

The next question is, whether the legislature had a right to reject the condition without declaring the whole settlement void. The commissioners accepted an assignment of property and debts, in full satisfaction of what was due to the State ; the bank was discharged from its debt to the State ; the property was delivered to the commissioners, and the injunction against the bank was dissolved. There was then a full and complete settlement of all matters between the State and bank. Had the commissioners stopped here, there can be no doubt both the bank and State would have been bound by the settlement. But they went further ; they annexed a condition to the settlement, that the State should pay certain debts of the bank, which they had no authority to do under the act appointing them. In this, and in this alone, they exceeded their powers. The State refuses to recognize this part of the settlement. The bank insists it cannot reject a part and confirm a part, but that it must reject or confirm the whole.

In Story on Agency, (page 156, sec. 166,) it is said the question may often arise, whether an act is wholly void or not, when the agent does more than he is authorized to do, or less than he is authorized to do. Lord Coke says, "Regularly, it is true, that where a man doth less than the commandment or authority committed to him, there, the commandment [*242] or authority being not pursued, the act *is void. And, where a man doth that which he is authorized to do, and more, there it is good for that which is warranted, and void for the rest. Yet both these rules have divers exceptions and limitations." Co. Litt. 158, a. "If a warrant of attorney is given to make livery to one person, and the attorney make livery to two, or if the attorney is to make livery of Blackacre, and the attorney makes livery of Blackacre and Whiteacre, the execution is good, so far as it is authorized by the power, and void as to the residue ; *for the excess is clearly ascertainable.*

So, if a letter of attorney be to make livery absolutely, and the attorney make upon condition, this is a good execution of the power, and amounts to a sufficient livery; and the condition is void." Story on Agency, 159, sec. 168. Livermore on Agency, 102. Again, "if an agent were authorized to procure insurance upon a ship for two thousand dollars, and he should procure a policy for two thousand dollars on the ship, and two thousand dollars on the cargo, the policy would be good as to the ship, and void as to the cargo, at least unless under special circumstances." Story on Agency, 160, sec. 169. Livermore on Agency, 101–102.

Nixon v. *Hyseratt and Hyseratt*, 5 J. R. 58, an action was brought against the defendants on a covenant of seizin, in a deed executed by their attorney who was authorized to sell the land and to "execute, seal, and deliver, in their names, such conveyances and assurances in the law, of the premises, unto the purchaser, his, her, or their heirs or assigns, for ever, as should or might be needful or necessary, according to the judgment of said attorney." The plaintiff was nonsuited. The Court says, "the attorney was authorized to sell and execute conveyances, and assurances in the law, of the land sold, but no authority was given to bind his principal, by covenants. A *conveyance or assurance is good and [*243] perfect without either warranty or personal covenants, and therefore they are not necessarily implied in an authority to convey; an authority is to be strictly pursued, and an act varying in substance from it, is void." Here the agent had done what he was authorized to do, and something more. He had not only sold the land and given a deed for it, but he had inserted a covenant of seizin in the deed, which he had no authority to do. The defendants had received the benefits of the sale, but it was not so much as pretended in that case, that they were, on that account, bound by the covenant of seizin; that they could not hold on to the purchase money, and, at the same time, disclaim the covenant.

So, in *Gibson* v. *Colt and others*, 7 J. R. 390. The defendants were the owners of a ship, and had authorized the master

to sell her. The master sold her to the plaintiff, and, at the time of the sale, represented her to be a registered vessel, according to the act of Congress. She was not a registered vessel, but a licensed coasting vessel only; and the action was brought for the deceit of the agent, in representing her to be a registered vessel. Judgment was given for the defendants, the Court holding that the agent had exceeded his authority in making the false representation, and that the defendants were not bound by it, although they had received ten thousand dollars for the ship.

In *Fenn* v. *Harrison and others*, 3 T. R. 757, defendants being the owners of a bill of exchange, which came to them by indorsement, employed an agent to get it discounted, telling him to carry it to market and get cash for it, but they would not indorse it. The agent procured a third person to indorse it, telling him he would indemnify him for it, and [*244] the bill was then discounted. The *acceptor of the bill failed, and the plaintiff, who discounted it, applied to defendants for payment, who at first refused, but afterwards promised to take it up. The Court held the defendants were not bound by the promise made by their agent to the person who indorsed the bill, and that, therefore, there was no consideration for the promise made by them to the plaintiff, to take up the bill. The bill in this case had been discounted, and the defendants had received the money.

In *Snow* v. *Perry*, 9 Pick. R. 539, bank bills were handed to an agent, with directions to deliver them to Snow, and see their amount indorsed on a note which Snow held against Perry, or to take a receipt for the amount. Snow received the bills and gave a receipt, by which he promised to indorse the amount on the note, or return the bills when called for. The bank soon after failed. The Court held the taking of the bills was payment *pro tanto*, the agent having exceeded his authority in taking a *conditional* receipt. The Court say: "But the plaintiff relies upon the terms of the receipt, stated in the report, and the condition or alternative therein expressed. If this receipt had been given by *Perry himself*, or by an agent

competent to bind him in this respect, he would be bound by the condition. Then the question recurs, could the messenger, consistently with his authority, accept such receipt? He was instructed to see the money indorsed, or to take a receipt as for so much money received in payment, or to bring the bills back. This was the extent of his authority."

The legal principle to be deduced from these cases, is this: That where an agent, acting within the scope of his authority, does a thing which, standing alone and by itself, would be binding on his principal, and, at the same time, does something more, which he was not authorized to do, *and [*245] the two are not so interwoven with each other that they cannot be separated, but constitute different parts of the same contract, that which the agent was authorized to do is binding on his principal, and that only which he was not authorized to do, is void. As the covenant of seizin in *Nixon* v. *Hyserott;* the false representation with regard to the registry of the vessel in *Gibson* v. *Colt;* the promise to indemnify the person who endorsed the bill in *Fenn* v. *Harrison*, and the condition in the receipt in *Snow* v. *Perry*. In each of these cases the agent had done what he was authorized to do, and something more; but that something more stood by itself, and was "clearly *ascertainable*," and was therefore void as it regarded the principal, and not merely voidable in connection with the whole contract. The excess in each of these cases, was an excrescence upon the due execution of the power, deriving no nutriment from the power itself, and consequently not entering into and forming a part of its execution, which was complete without it. By this I do not intend to be understood as saying, that the land or the ship would have sold for as much as it did, without the covenant of seizin, or false representation; or that the note would have been discounted had it not been endorsed, or that the bank bills would have been received, had an unconditional receipt been required. This is not the principle on which these cases were decided; but the total want of authority in the agent to do what he did.

In what respect does the present case differ from *Nixon* v.

Hyseratt? They are, it seems to me, the same in principle. They differ in form only. In that case there was a covenant; in this, there is a condition subsequent, not a condition precedent; and in both cases the agent exceeded his authority. On what principle of law can it be holden, that the covenant [*246] in that case was void and not binding *on the principal, and the condition in the present case is good and binding on the State?

A person who deals with an agent is bound to inquire into his authority, and ignorance of the extent of the agent's authority is no excuse. But it cannot be said the bank was ignorant of the authority of the commissioners, who acted under a public law or statute of the State, of which the bank had full knowledge. The commissioners, and those acting on the part of the bank, I have no doubt, supposed they had authority. But this, while it acquits the commissioners and the representatives of the bank of bad faith, can have no effect on the legal rights of the parties to the settlement. Every man is supposed to know what the law is, and his rights are to be determined accordingly. It is no excuse that he was ignorant of the law, or had given an erroneous construction to it. If the bank suffer in consequence of such ignorance, it is not the fault of the State.

In *Nixon* v. *Hyseratt*, it does not appear Nixon knew the agent was exceeding his authority, in warranting that his principals were seized of the land. The bank is chargeable with such knowledge, or, in other words, with a knowledge that the commissioners were exceeding their powers, in consenting to the condition; and can it take advantage of its own wrong, to compel the State either to ratify the condition, or reject the settlement *in toto?* Would not the adoption of such a rule open the door to fraud?—to collusion between the agent and persons dealing with him?

The agreement was not executory but executed at the time; and the bank has, from that time to the present, had all the advantages and benefits of the settlement. The injunction was dissolved and the debt due to the State canceled. If it was now in the power of the State to reject the settlement, which

it cannot do, (except the *condition which was never [*247] binding on the State,) the bank could not place back the claim of the State where it was before the settlement, and the dissolution of the injunction. And must the State either lose all benefit of the proceedings it had instituted against the bank, and of the injunction it had obtained, or pay a sum of money for the bank it never had agreed to pay? The doctrine contended for, if law, would present this alternative.

It is insisted the bill is multifarious, and the prayer of the bill is referred to in proof of the fact. To determine whether a bill is multifarious, we must look to the stating part of the bill, and not to the prayer alone; for if, in his prayer for relief, complainant ask several things, to some of which he may be entitled and to others not, the bill is not, on that account, multifarious, but he will, on the hearing, be entitled to that specific relief, only, which is consistent with the case made in the stating part of the bill. The whole drift and object of the bill is to obtain a discovery and account, from Joy & Porter, of the assets assigned, and in their possession as attorneys for the bank when the assignment was made, and which they afterwards continued to hold as attorneys for the State. The bank is made a party in consequence of the claim it sets up to these assets. The bill is somewhat in the nature of a bill of interpleader; but, instead of being filed by Joy & Porter, it is filed by the commissioners against them and the bank, they setting up the claim of the bank as an excuse for not accounting to the commissioners.

Demurrer overruled, with costs.

[*248] *REEVES *v.* SCULLY.

Where a mortgage was given accompanying a promissory note, and they were assigned before due to a *bona fide* endorsee, *held*, that he was not affected by any equities existing between the original parties. It would have been otherwise, if a bond had been given instead of the note.[1]

THE bill was filed to foreclose a mortgage for $900, payable in one year, accompanied by a promissory note payable to the mortgagee, Hawkins, or order. Hawkins endorsed the note, and assigned the mortgage to Scully, before the note was due. The mortgage and note were given to Hawkins, to secure him in paying defendant's debts; and Hawkins, as appeared from the evidence, had, at different times, paid money for Scully, to the amount of $788. Reeves was a *bona fide* holder of the note and mortgage, and did not know the object for which they were given to Hawkins, when he took an assignment of them.

THE CHANCELLOR. The decree must be entered for the amount of the note and mortgage. Reeves, as *bona fide* endorsee of the note, was not affected by the equities existing between Hawkins and Scully. It would have been otherwise, if a bond, instead of a note, had been given with the mortgage.

[1] See Russell *v.* Waite, *ante*, 31 and note.

*Linus Jacox *v.* Nelson W. Clark.[1] [*249]

Where complainant had stood by, without objecting, and allowed defendant to go on and expend a considerable amount of money in the erection of a mill, in violation of the terms of a grant made by complainant, in consideration of the erection of the mill, of the right to use the water of a creek in a particular manner, it was *held*, that, by his silence, he had waived all right to relief in equity, by injunction, against diverting the water.[2]

This was a motion to dissolve an injunction, on bill and answer.

Complainant had granted to defendant the right of using the water in a creek, which was the outlet of a small lake, for a mill to be erected by him, which was the sole consideration of the grant. He erected the mill, but at a point different from that indicated by the grant, and took the water directly from the lake, instead of the creek, and, after using it, turned it into the Clinton river, instead of the bed of the creek, which connected the lake with the river, in violation of the terms of the grant. The bill prayed a reconveyance of the right granted, and an injunction against diverting the water.

G. W. Wisner, in support of the motion.

M. L. Drake, contra.

The Chancellor. It would seem from the deed from Jacox to Clark, so far as it is set forth in the bill, that the water was to be used, in such way, by Clark, as to be turned back, after it had been used, into the stream on Jacox's land.

If this should prove to be the true construction of the grant, it appears Clark gave a different construction to it, and that Jacox acquiesced in such construction, or at *least, [*250] did not object to it, until Clark had erected his mill,

[1] S. C. *post*, 508.

[2] See Payne *v.* Paddock, *post*, 487.

dug the race, and built the dam, at an expense of some two thousand dollars. Jacox should have objected before. He should not have permitted Clark, without so much as informing him of his error, or objecting to the course he was taking, to go on, and expend so much money, contrary to the agreement between them, if he intended to seek redress in this Court, by injunction, to prevent a diversion of the water, instead of bringing an action at law, for damages. His silence must, under the circumstances, be construed into a waiver of his right to such relief in equity. He was frequently present, while the work was going on, and never made any objection to it. Defendant did not know he was dissatisfied, until the service of the subpœna.

Injunction dissolved.

[*251] *Benjamin F. Cooper *v.* Isaac J. Ulmann *et al.*

The assignment of a debt secured by a mortgage, carries with it the mortgage, as an incident to the debt, although there is no mention made of the mortgage in the assignment. So, the assignment of a part of a debt, or of one of several notes secured by a mortgage, carries with it a proportional interest in the mortgage, unless it is agreed between the parties, at the time, that no interest in the mortgage is to pass to the assignee.[1]

Where there are several notes falling due at different times, the fact that one note becomes due first, will not, of itself, give it a preference over the rest, where the mortgaged premises are insufficient to pay the whole.[2]

The assignor may, if he see fit, give the assignee a priority of payment; but the law gives no such priority, where there is no understanding or agreement between the parties to that effect.

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[1] See Martin *v.* McReynolds, 6 Mich., 70; Dougherty *v.* Randall, 3 id., 581; Wayman *v.* Cochrane, 35 Ill., 151; Olds *v.* Cummings, 31 id., 188; Hamilton *v.* Lubukee, 51 id., 415; Fortier *v.* Darst, 31 id., 212; Sargeant *v.* Howe, 21 id., 148; Vansant *v.* Allmon, 23 id., 30; Pardee *v.* Lindley, 31 id., 174; Edgerton *v.* Young, 43 id., 464; Kleeman *v.* Frisbie, 63 id., 482; White *v.* Sunderland, 64 id., 181.

[2] English *v.* Carney, 25 Mich., 178; McCurdy *v.* Clark, 27 id., 445.

Bill to foreclose a mortgage.

On the first of October, 1836, Ullmann conveyed the mortgaged premises to Harvey Hunt and James M. Hunt, for $5,500. Two hundred dollars were paid down, and a mortgage and six promissory notes were given for the balance;—one note for $300 and interest, payable January 1st, 1837, and the others for $1,000 each, payable, with interest, in one, two, three, four, and five years. The first two notes had been paid. The others remained unpaid, except $162 indorsed on the third note, previous to the assignment of it by Ullmann to complainant, by the following instrument:

"I hereby assign to Benjamin F. Cooper the note of Harvey and James M. Hunt, becoming due on the first day of January, 1839, for $1,000, in payment of the debt due from me to Benjamin F. Cooper, as surviving partner of Zebulon H. Cooper, deceased, due to him by virtue of a judgment and decree in the Supreme Court and Court of *Chancery, in the [*252] first circuit, of the State of New York. The said Ullmann, in consideration of the premises, hereby agrees with, and declares to, the said Cooper, that if the mortgaged property referred to in the said note be encumbered by any encumbrance prior to the said mortgage, then that the said Ullmann will continue liable to the said Cooper, to the amount of the judgment and decree, as if this agreement had not been executed.

"*Benjamin F. Cooper,*
"*Isaac J. Ulmann.*

"July 9th, 1839."

Harvey Hunt was dead when the note was assigned; and, James M. Hunt failing to pay it, a suit was brought upon it in the Circuit Court of the United States, and a judgment recovered against him, by complainant, in June, 1840, for $1,141, on which an execution was subsequently taken out, and returned unsatisfied. The three notes payable after the one assigned to complainant, still belonged to Ullmann, and the

mortgaged property was not sufficient to pay both Ulmann and complainant.

E. C. Seaman, for complainant.

The assignment of the note to Cooper, carried with it so much of the mortgage as was necessary to pay it. The mortgage is an incident to the debt, which it was given to secure; and the assignment of the debt carries with it the mortgage. The notes must be paid out of the proceeds of the mortgaged premises, in the order they became due. *Mechanics' Bank* v. *Bank of Niagara*, 9 Wend. R. 410; 1 Hopk. R. 569.

H. H. Emmons, for defendant Ulmann.

The mortgaged premises being insufficient to pay all of the notes, they must be paid *pro rata*. Priority in time of [*253] *payment does not give priority of right. *Donley* v. *Hays*, 17 Serg. & Rawle R. 400. The complainant might have collected his debt on his execution, and, having failed to do so, he has lost his lien on the property, as against Ulmann.

The Chancellor. The assignment of a debt, secured by a mortgage, carries with it the mortgage as an incident to the debt, although there is no mention made of the mortgage in the assignment. So, the assignment of a part of a debt, or of one of several notes secured by a mortgage, carries with it a proportional interest in the mortgage, unless it is agreed between the parties, at the time, that no interest in the mortgage is to pass to the assignee. *Green* v. *Hart*, 1 J. R. 580; *Pattison* v. *Hall*, 9 Cow. R. 747.

The only question in the present case arises out of the inadequacy of the mortgaged premises for the payment of both complainant and Ulmann. Shall they be paid *pro rata*, or shall a peference be given to complainant's debt, and he be paid first, leaving the balance to be applied on what is due to Ulmann? The mere fact that complainant's note was the first to become due, will not, of itself, give it a preference over the

other notes. It was so decided, and I think correctly, in *Donley* v. *Hays*, 17 Serg. & Rawle R. 400. In that case a mortgage, and seven accompanying bonds, payable at different periods, had been given to secure a debt of $5,036, and the mortgagee had assigned four of the bonds to different individuals, retaining three himself. The mortgaged premises were sold for $2,000, and the question was, whether the several bonds should be paid in the order in which they became due, or *pro rata*. The Court decided they should be paid *pro rata*. There was no guarantee, no promise or representation of priority of payment in the case. There is no conflict *between [*254] this case and *The Mechanics' Bank* v. *Bank of Niagara*, 9 Wend. R. 410. On the contrary, this last case, so far as any inference can be drawn from it, would seem to be a confirmation of the principle decided in *Donley* v. *Hays*. The case was this: $1,933, part of a bond and mortgage for $2,250, was assigned to pay a debt; and the mortgaged premises being afterwards sold, brought $1,350, only. The question was, whether the $1,350 belonged to the assignee, or must be divided, *pro rata*, between him and the mortgagee. The Superior Court of the City of New York decided in favor of a *pro rata* distribution of the money; but the judgment was afterwards reversed by the Supreme Court, on a writ of error. The reversal, however, was not upon the ground that an assignment of a part of a debt, secured by a mortgage, gives to the assignee a right to exhaust the mortgage security to satisfy his part of the debt; but that, from the very terms of the assignment itself, in that particular case, it appeared such must have been the intention of the parties, at the time of making the assignment. The assignor may, if he see fit, give the assignee a priority of payment; but the law gives no such priority, where there is no understanding or agreement between the parties, to that effect. The note, on its face, refers to the mortgage, and is payable to Ulmann or bearer. By the written assignments it was to be received, not as security, but in payment of the debt due from Ulmann to complainant, as surviving partner of Zebulon H. Cooper, deceased; and Ulmann agreed his

liability to pay the debt should continue, if there was any prior encumbrance of the mortgaged premises. It is evident, from the assignment, the note was to be taken as absolute payment of the debt, unless it should turn out there was a prior encumbrance; but it is not so clear that its payment was to be [*255] preferred to the other notes, in case *it should be found necessary to resort to the mortgaged premises for their payment. The testimony of Hunt, however, who was present at the time, removes all difficulty on this point. He says he understood from both parties, that the mortgage, or so much of it as was necessary to secure to complainant the payment of his note, was assigned. He also says Ulmann afterwards told him complainant had a lien on the mortgaged premises, to the amount of the note.

There must be a reference to a Master to compute the amount due complainant, for principal and interest, on the note held by him; and, on the coming in of the Master's report, a decree must be entered, giving complainant a priority of payment out of the mortgaged premises.

[*256] *Cephas G. Woodbury *v.* Judah Lewis.

The act of 1840, for the foreclosure of mortgages, requires the redemption money of the premises sold to be paid to the register of deeds, and to no other person; and it is his duty, upon such payment, to destroy the deed, and pay over the money to the purchaser, his heirs or assigns.

The register of deeds has no right to receive anything but money, in redemption of property sold. His powers are limited to receiving the money, and destroying the deed. He is a special agent for these purposes, only, and his acts are not binding on the purchaser, when he exceeds or departs from his authority, without the assent of the purchaser.

Where a bill was filed to have a deed of mortgaged premises cancelled, on the ground that the redemption money had been paid, and it appeared that the register of deeds had received a check for the amount from complainant, it was held to be no payment, and the bill was dismissed.[1]

[1] As to payment by draft or check, certificate of deposit, &c., see generally,

Where the register of deeds had received a check from complainant, in redemption of mortgaged premises, and given him a receipt for the same, as money, on behalf of defendant, who was the purchaser at the mortgage sale, he was held to be a competent witness for either party, as being equally liable to both.

The receipt of the register of deeds is not conclusive evidence of the payment of redemption money, as against a purchaser.

This was a bill to have a deed executed on a statutory foreclosure of a mortgage, given up and cancelled, on the ground that the mortgaged premises were redeemed, after the sale, and before the time of redemption expired.

E. B. Harrington, for complainant.

A. W. Buel, for defendant.

The Chancellor. The premises in question were mortgaged to Lewis on the 4th day of March, 1837, by one William Walker; and, on the 6th day of June, 1839, they were sold under a power of sale in the mortgage, *and pur- [*257] chased for $110, by Lewis, who received from the officer who sold the premises, a certificate for a deed in one year, unless they were redeemed. On the 27th day of December, 1839, Woodbury purchased the premises of Walker, and, on the 6th day of June, 1840, deposited, as the bill alleged, $121 with George R. Griswold, register of Wayne county, in which the land is situate, for its redemption. Lewis obtained a deed from the officer, after the year had expired. By his answer, he denies that the money was deposited with the register, and says a check for the amount, on the Bank of Michigan, and not the money, was deposited. Griswold's receipt, dated June 6th, 1840, for one hundred and twenty-one dollars, being the

The People *v.* Commissioners, &c., 19 Mich., 470; Beardslee *v.* Horton, 3 id., 560; Burrows *v.* Bangs, 34 id., 304; Dedman *v.* Williams, 1 Scam., 154; Mayo *v.* Carmach, 13 Ill., 289; Strong *v.* King, 35 id., 9; Ralston *v.* Wood, 15 id., 159; Smalley *v.* Edey, 19 id., 207; Stevens *v.* Bradley, 22 id., 244; Prettyman *v.* Barnard, 37 id., 105; Leake *v.* Browne, 43 id., 372; Heart *v.* Rhodes, 66 id., 351; Tucker *v.* Conwell, 67 id., 552; Gage *v.* Lewis, 68 id., 604; Dempster *v.* West, id., 613; Hodgen *v.* Latham, 33 id., 344.

amount of redemption money, &c., was admitted as evidence on the part of complainant, by consent of parties; and Griswold was examined as a witness by defendant, but was objected to, as incompetent, by complainant. He states that he received a check on the Bank of Michigan for the $121, and not the money. Upon this state of facts, it is insisted for the defendant,

First. That the register was not authorized to receive the money by the act of March 31st, 1840.

Secondly. Admitting his authority, that he could not receive a check, or anything except money.

By the revised statutes, a certificate was given to the purchaser, for a deed after the time of redemption had expired; and the premises were redeemed by paying to the purchaser, or officer who sold them, the sum for which they were sold, with ten per cent. interest. R. S., 501. The law of 1840 requires the officer or person making the sale, forthwith to execute a deed to the purchaser, endorsing thereon when it will become operative in law, unless the land is redeemed, and then to deposit it in the register's office of the proper county. [*258] where it is to be kept in *trust for the purchaser, and to be delivered to him, unless the land is redeemed, and. if redeemed, then the deed is to "be destroyed by the register. and the purchase money, and the interest thereon, allowed by law, to be paid over to the purchaser, his heirs or assigns." Laws 1840, p. 145. The act does not say in express terms, the redemption money shall be paid to the register, but it is clearly to be implied from the language that such was the intention of the legislature. It is difficult to see how the law could be carried into execution on any other principle. The register is to destroy the deed in case of redemption, but how is he to know whether the land has been redeemed or not, unless he receives the money? If it was to be received by the officer selling the premises, or the purchaser, as provided by the revised statutes, and not by the register, the law would have required him to cancel the deed only on the certificate of the one or the other of these persons, and not made it his duty to destroy the

deed, without the means of ascertaining the money had been paid, as would be the case if the construction contended for was correct. Besides, the purchase money, and the interest, are to be paid over to the purchaser, his heirs or assigns; not by the officer who sells, when received by him, but generally, and in all cases;—and that after the deed had been destroyed. Now, as the register is to destroy the deed, and then the money is to be paid to the purchaser, it would seem that it is to be paid by the former, and, consequently, that it must be received by him.

The register should not have received the check, or any thing but the money. The statute does not authorize him to receive anything else. His powers are limited to receiving the money and destroying the deed, and his acts are not binding upon the purchaser, when he exceeds those powers, or departs from them by receiving something else *than the [*259] money, without the assent of the purchaser. He is to be regarded in the light of a special agent, who must conform to the authority with which he is clothed. *Dickinson* v. *Gilliland*, 1 Cow. R., 481, 498. A sheriff cannot discharge an execution, by receiving a promissory note, or a draft in satisfaction of it. 1 Cow. R. 46; 4 Cow. R. 553. It would be dangerous in the extreme to allow the sheriff or register, to receive anything except the money, in discharge of the debt. It would be placing indulgences at their disposal, that might become an article of traffic between them and the debtor, to the great prejudice of the creditor.

Griswold is a competent witness to prove that the check, and not the money, was deposited with him when he gave the receipt. His interest is equally balanced. The receipt is evidence against him, of so much money received by him, for the person to whom it belongs, whether it be complainant or defendant. He must account to one or the other; and it is immaterial which, so far as he is concerned, for the receipt in either event would be evidence against him, and the decree in this case would not be evidence in his favor. *Milward* v. *Hallett*, 2 Caines R. 77, and note, p. 84.

The receipt is not conclusive evidence against defendant, of the payment of money.

Bill dismissed, with costs.

[*260] *JAMES J. GODFROY *v.* HENRY DISBROW, SAMUEL GERARD, ALEXANDER MACKINGTOSH, ÆNEAS MACKINTOSH, JAMES MACKINTOSH, ANN HUNT, JANE MACKINTOSH, ARCHANGE SHAW, CATHARINE MACKINTOSH, ELIZA REYNOLDS, AND TODD REYNOLDS.

The ordinance of 1787, for the government of the Northwest Territory, does not declare that a deed shall be void, or that the title to land shall not pass by it, unless such deed be recorded. The object of all registry laws is to protect subsequent *bona fide* purchasers, and there is nothing in the ordinance making an unrecorded deed void as against the grantor.

The fact that a mortgage for purchase money, given at the time the conveyance was made, was executed with all proper formality, raises the presumption that the deed (which in this case, had been lost, unrecorded) was likewise properly executed.[1]

A deed executed without a witness, is good in equity as a contract for the sale of land, and may be enforced as such.[2]

Under the act of June 9th, 1819, it is necessary for a party who wishes to avoid the effect of a subsequent conveyance first recorded, to show that the grantee, in such conveyance, had notice of the prior conveyance when he took his deed, or that he had not paid a good and valuable consideration.

Where the first purchaser is in possession of the premises, and the second purchaser is aware of that fact at the time he purchases, that is sufficient notice to him of the rights of the first purchaser; and he must take the premises subject to all equities existing between his grantor and the first purchaser.[3]

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[1] See Goodell *v.* Labadie, 19 Mich., 88.

[2] See Crane *v.* Reeder, 21 Mich., 24, deed under the law of 1820.

A deed without subscribing witnesses is good as between the parties thereto, witnesses being required only for the purpose of registry. Dougherty *v.* Randall, 3 Mich., 581.

[3] See Rood *v.* Chapin, *ante*, 79, and note.

Although a party may not himself be a *bona fide* purchaser without notice, yet, if his grantor was such purchaser, the former is entitled to all his rights, and the protection which the law would give him.

The presumption is, that a subsequent purchaser, who has got his deed first recorded, is a *bona fide* purchaser without notice, until the contrary is made to appear.

Where there is an adverse possession, the legal title cannot pass by a conveyance from a person out of possession.[1]

THIS was a bill filed to establish a lost deed, and praying that the several defendants claiming under the grantor might be compelled to release to complainant.

*The facts of the case appear sufficiently in the opin- [*261] ion of the Court.

Fraser, Goodwin & McClelland, for complainant.

A. D. Fraser.

I. This is a clear case for equity jurisdiction, on several grounds; and especially on the ground of the loss of the deed from Mackintosh to Godfroy.

It is a well settled principle that if a lost deed concerns the title to real estate, it is competent to come into this Court and *establish the possession*, or to have a re-execution of a lost deed. 1 Madd. Ch. 23; 2 Atk. R. 61; 1 J. Ca. 417.

It is upon this principle that grants are presumed, or supplied, in support of a long possession, and equity will not permit such possession to be disturbed. 1 Madd. Ch. 25; Jer. Eq. 362; 1 Vern. R. 195; 2 Vern. R. 390, 516; 1 Pet. R. 241.

II. The Court will interfere to vacate a deed which throws a cloud over complainant's title. 17 Ves. R. 111; 5 Paige R. 493; 2 Paige R. 435; 2 Story Eq. 8, 17.

[1] See, also, Bruckner *v.* Lawrence, 1 Doug., 19; Hubbard *v.* Smith, 2 Mich., 207; Crane *v.* Reeder, 21 Mich., 24, 82. The grantee could, however, enforce his rights in the name of his grantor. Stockton *v.* Williams, 1 Doug., 546. See, also, Crane *v.* Reeder, *supra*.

The common law rule above laid down in the principal case is now changed by statute. Comp. Laws, 1871, § 4,209.

III. It is conceived that this Court had also jurisdiction under the statute of 1840, to quiet the complainant's title, and to decree a release of defendant's pretended interest in the premises. Laws 1840, p. 127.

IV. The complainant is entitled to the relief sought, having been in possession claiming adversely at the time of the several transfers subsequent to the conveyance under which he claims title. The doctrine of adverse possession was fully recognized as law in this State, by the Supreme Court, in the case of *Bruckner* v. *Lawrence*, MS. March, 1843.

V. The statute of limitations is available to protect the possession of a party which has been continued and adverse

[*262] *VI. The possession of complainant was notice of his claim.

H. T. Rackus, for defendant Disbrow.

The complainant is not entitled to the relief prayed for.

I. The bill and evidence fail to disclose that he has or ever had a deed of the premises in question, which could avail as against the defendant.

1. It does not appear that the deed, which is set up in the bill as the foundation of his title, was executed in accordance with the ordinance of 1787, and the law in force respecting the execution of such instruments. There is no proof that the deed had the requisite witnesses, &c. Vide Ordinance of 1787, (R. S. p. 24.)

2. The deed from Mackintosh to Godfroy, (if any was ever executed) is void for want of being recorded. Ordinance of 1787, (R. S. p. 24;) Laws 1820, p. 157.

II. The fact that the bill has been taken as confessed against Gerard, is of no avail. He is a non-resident defendant, and never was served with process. Moreover, Disbrow, his grantee, by his answer, denies notice to Gerard and to himself, and complainant must therefore substantiate his case.

III. Disbrow is entitled to all the rights of his grantor, Gerard, whether he himself was affected with notice or not.

No notice is proven as to Gerard, who must, therefore, be presumed to have been a *bona fide* purchaser without notice.

IV. Neither the statute of limitations nor adverse possession, can be the ground of affirmative relief in this Court. Adverse possession is properly tried by jury as a question of fact.

V. If the adverse possession of complainant is of any avail, it can only be as to those parts of the land where *there has been an actual *pedis possessio*. It can avail [*263] as to no other parts of the premises.

The Chancellor. The bill states that Gabriel Godfroy, on the 10th day of October, 1844, purchased the premises in question, situate on the River Raisin, of Angus Mackintosh, for $1,000; and that Mackintosh executed a deed to him, which was not recorded, and has since been lost. To secure the purchase money, Godfroy executed a bond and mortgage of the premises to Henry I. Hunt, the son-in-law of Mackintosh,—Hunt being an American citizen residing in Detroit, and his father-in-law, a British subject, residing in Canada, opposite Detroit. The bond and mortgage were made to Hunt, in consequence of the late war between the United States and Great Britain, and to prevent any difficulty in the collecting of the money. Godfroy took immediate possession of the premises, and he and his grantee, the complainant, have been in possession from that time to the present, and have erected valuable buildings, and made other valuable improvements. In 1835, Gabriel Godfroy sold to complainant. In 1827, Mackintosh, with his family, left Canada, and went to Scotland to reside, where he afterwards died. In July, 1835, Alexander Mackintosh, one of the heirs of Angus Mackintosh, conveyed the premises to Samuel Gerard of Montreal, who, April 25th, 1836, conveyed them to Disbrow. The deed from Alexander Mackintosh to Gerard was recorded, November 12th, 1835, and the one from Gerard to Disbrow, May 13th, 1836. The bill is filed against Disbrow, Gerard, and the heirs at law of Angus Mackintosh. Disbrow is the only one of the defendants that

has appeared and answered, and the bill has been taken as confessed by the other defendants, all of whom, except Ann
[*264] Hunt and Catharine Mackintosh, on whom the *subpœna was personally served, are non-resident defendants, and have been brought into Court by advertisement under the statute.

Disbrow, in his answer, denies all notice of the conveyance from Angus Mackintosh to Gabriel Godfroy, and insists that both he and his grantor, Gerard, are *bona fide* purchasers, without notice.

The existence and loss of the deed from Angus Mackintosh to Gabriel Godfroy, are fully established by the positive testimony of Godfroy, and the voluminous circumstantial testimony in the case. But it is insisted that, under the ordinance of 1787, it was necessary that the deed from Mackintosh to Godfroy should be recorded, in order to pass the title. I do not so read the ordinance. It does not declare the deed shall be void, or the title shall not pass, unless it is recorded. The object of all registry laws is to protect subsequent *bona fide* purchasers. It would, therefore, be a harsh construction of the ordinance, where the grantee had neglected to have his deed recorded, to say it should, for that reason, be void between him and the grantor. There is nothing in the ordinance requiring such a construction to be given to it. 1 Blackford R. 162.

It is further objected that it does not appear from the evidence whether the deed was properly executed, or what premises, or what estate in them was conveyed. Godfroy states explicitly he purchased the farm in question from Angus Mackintosh, in 1814, and that Mackintosh executed to him a deed for it, which is lost; and that he was the owner of the farm in fee simple, from 1814 to 1835, when he sold it to complainant. It is true he says nothing about any witnesses to the deed. The question does not appear to have been asked him. There is, however, I think, sufficient evidence before the Court,
[*265] to *warrant the conclusion it was properly executed.

The mortgage given at the same time, and which has been found since the witness was examined, appears to have

been executed with all proper formality, and it is reasonable to suppose the same formality was observed in the execution of the deed. If there were no witness, it would be good in equity as a contract for the sale of the land, and, as such, might be enforced against the heirs of Angus Mackintosh.

By "an act in addition to an act entitled 'an act concerning deeds,'" adopted by the Governor and Judges of the territory of Michigan, June 9, 1819, all deeds previously given, and not recorded, were declared to be fraudulent and void against subsequent purchasers and mortgagees, unless recorded on or before the first day of December, 1821. To get rid of the legal effect of a subsequent conveyance first recorded, it is necessary to show the second grantee had notice of the prior conveyance when he took his deed, or that he has not paid a good and valuable consideration. Where the first purchaser is in possession of the premises, and the second purchaser is aware of that fact at the time he purchases, that is sufficient notice to him of the rights of the first purchaser; and he must take the premises subject to all equities existing between his grantor and the first purchaser. *Rood* v. *Chapin*, *ante*, 79. Disbrow knew complainant was residing on the land when he purchased of Gerard. He therefore took his deed subject to all equities, if any, existing between complainant and Gerard. He was not a *bona fide* purchaser without notice. Still, if his grantor was such purchaser, he is entitled to all his rights, and to that protection which the law would give Gerard. There is no evidence showing Gerard had notice of complainant's title, when he purchased, or that he knew complainant was in possession of the *premises. The bill has been taken as con- [*266] fessed against him; but as he is a non-resident defendant, and has not appeared, it is no evidence against him, much less against Disbrow, his grantee, who has appeared, and put in an answer denying notice to his grantor, as well as to himself. The presumption of law is, that a subsequent purchaser, who has got his deed first recorded, is a *bona fide* purchaser without notice, until the contrary is made to appear.

There is another ground, however, on which the complainant

is entitled to the relief he asks against the deed from Alexander Mackintosh to Gerard. It is this. By reason of the adverse possession of complainant, when this deed, as well as the one from Gerard to Disbrow, was executed, the legal title did not pass. *Bruckner* v. *Lawrence*, MS. Sup. Court, March, 1843. It is unnecessary to inquire whether, if the legal title had been in Alexander Mackintosh, when he conveyed to Gerard, an equitable title would have passed by the deed, notwithstanding the adverse possession. It would not, so as to bar a prior equity.

The defendants must release to complainants, and pay costs.

[*267] *John E. Schwarz, Catharine Schwarz, and Eurotas P. Hastings *v.* Tunis S. Wendell.

The general rule is, that whatever is responsive to the bill is evidence for, as well as against the defendant.[1]

If a fact stated in the bill, and answered by defendant, is material to complainant's case, or is a circumstance from which a material fact may be inferred, the answer, in such case, is responsive to the bill, and is evidence in the cause.

An answer may sometimes be evidence of a fact not stated in the bill, as when the bill sets forth part of complainant's case only, instead of the whole, and the part omitted, and stated in the answer, shows a different case from that made by the bill, and is not in avoidance merely.

Where an answer does not show a different case from that set up in the bill, but sets up new matter in avoidance, it is not evidence of such new matter.[2]

A trustee is not allowed to deal with the *cestui que trust* as with a third person, and purchases of trust property made by him, will not be sustained,

[1] See Robinson *v.* Cromelein, 15 Mich., 316; Roberts *v.* Miles, 12 id., 297.

[2] See Millard *v.* Ramsdell, Harr. Ch., 73; Attorney General *v.* Oakland County Bank, *ante*, 90: Van Dyke *v.* Davis, 2 Mich., 144; Hurst *v.* Thorn, id., 213.

unless the Court is satisfied that he has acted throughout with the most perfect fairness, and taken no advantage of his peculiar relation.[1]

The defendant W., a trustee, having an opportunity to make what it was supposed would be an advantageous purchase for his *cestui que trust*, a married woman, of the remaining two-thirds of land of which she owned an undivided third, refused to make it without an equal share of the profits, and, by his advice, and that of her husband, the *cestui que trust* was induced to make a note for $4,000, to raise money for the purchase, which was indorsed by W. and finally paid out of the trust funds; and the husband, March 7th, 1836, without consulting the *cestui que trust*, agreed with W. on her behalf, that he should have half of the profits of the property to be purchased, deducting traveling expenses, &c. attending the same, and if he should not succeed in purchasing, that his expenses should be paid; and W. purchased one of the two-thirds and took a conveyance of it to himself, as trustee. An offer being made for the purchase of one-third, W. advised the *cestui que trust* and her husband to accept it, but they declined: and W. insisting on selling his share, they agreed to purchase from him, and pay him what would be his share of the profits, by assigning a certain bond and mortgage, and giving a note for the balance. When the assignment was drawn up, the *cestui que trust* declined executing it, alleging that she wanted the property for other purposes, and also that an account presented by W. was too high. W. then requested her to set off his share of the land, and appoint another trustee. She then agreed to purchase his share *on the conditions previously [*268] agreed to, and a new trustee was appointed. In this settlement a note was given by the *cestui que trust* and her new trustee, for $3,980.24, to pay the account which W. had presented for his services. The Court set aside the agreement of March 7, 1836, and the sale by W. to the *cestui que trust*, and decreed that W. should procure the note for $3,980.24, (which he had transferred,) to be canceled, or else that the amount of it, with interest from the day it fell due, should be charged against him in the account to be taken of his trust, and that he should be allowed a reasonable compensation for his services as trustee.

A defendant cannot, by his answer, vary the terms of a written contract.

The agreements of the husband of a *cestui que trust*, in relation to the trust, are not binding upon her.

Where a bill, asking, among other things, relief against a note, was filed

[1] See Sheldon *v.* Rice, 30 Mich., 296; McDonald *v.* Fithian, 1 Gilm., 269; Dennis *v.* McCagg, 32 Ill., 429; Fish *v.* Cleland, 33 id., 238; Casey *v.* Casey, 14 id., 112; Fairman *v.* Boom, 29 id., 75; Merryman *v.* David, 31 id., 404; Kerfoot *v.* Hyman, 52 id., 512; Cottom *v.* Holliday, 59 id., 176; Ely *v.* Hanford, 65 id., 267; Mason *v.* Bauman, 62 id., 76; Tewksbury *v.* Spruance, 75 id., 187.

But parties sustaining fiduciary relations to each other may make amicable settlements of their accounts. Hooper *v.* Hooper, 26 Mich., 435.

within three years and a half from the time it was given, and within six months after it became due, *it was held*, that the delay was not unreasonable, and was no ground for refusing relief.[1]

A trustee is entitled to a reasonable compensation for his time and services.

The bill states that Catharine Schwarz, wife of John E. Schwarz, on the eleventh day of February, 1823, was entitled to one undivided third part of all the real and personal estate of her late father, Abraham Sheridan, deceased, and that she and her husband, the said John E., on that day, by an indenture of two parts, conveyed to Isaac Wampole all her interest in the real estate aforesaid, for her sole use and benefit, and subject to her appointment; and that, on the 14th day of October, 1828, they assigned to him, in trust as aforesaid, a bond and mortgage for $10,000. That, on the 27th day of April, 1829, the defendant, Wendell, was appointed trustee, in the place of Wampole, and continued such until the 28th day of January, 1837, when the complainant, Hastings, was appointed.

That, on the 6th day of March, 1836, Wendell, who was then acting as trustee, inquired of John E., whether it was probable that the two-third parts of seventeen [*269] *in-lots and four out-lots in Erie, Pennsylvania, held in common by Catharine, and two other heirs of Abraham Sheridan, deceased, residing in Philadelphia, could be bought; adding, that he had received an offer from Captain John F. Wight, for the whole of said property, and that, perhaps, twenty-five or thirty thousand dollars could be obtained for it, but that no person would purchase the undivided third part belonging to Catharine alone. John E. replied it was probable they might be purchased, if the owner had not heard of the sudden rise of property in the western country, and they should be offered money. Wendell then asked him what share he, John E., would allow him, if he would raise the money, go to Philadelphia, and purchase one or both of said shares. John E. replied, he would allow him a liberal compensation for his time and trouble, and would pay all his expenses. This, and

[1] See DeArmand *v.* Phillips, *ante*, 186.

several other offers, Wendell declined, proposing, at the same time, to raise the money, and make the purchase, if John E. would allow him one-half of the profits; to which John E., without consulting with Catharine, finally assented. On the next day, at the request of Wendell, John E. and Catharine came from Springwells, where they reside, to Detroit, when, for the first time, Wendell required Catharine to execute a note for $4,000, payable to him or his order, at the Bank of Michigan, in ninety days, on which to obtain the money. John E., having understood Wendell's proposition on the previous day as an offer to furnish the money, at first protested against it. But Catharine, acting on the advice of John E. and Wendell, was finally persuaded to execute it. Wendell then drew up the following agreement, which was signed by him and John E., but without the knowledge, direction or consent of Catharine, viz:

"Memorandum of an agreement made this 7th day of *March, 1836, between Tunis S. Wendell and John E. [*270] Schwarz, for himself, and on behalf of his wife, Catharine Schwarz, viz: It is understood between the parties that the said T. S. Wendell has this day obtained a loan from the Bank of Michigan, on a note of Catharine Schwarz, endorsed by said Wendell, for $4,000, for the purpose of going to Philadelphia, to purchase the interest which Richard J. Harding and John G. Thomas have in 17 in-lots and 4 out-lots in the village of Erie, Penn'a., on the best terms he can; and, if he succeeds, then the profits arising on said purchase are to be equally devided between the said Wendell and Catharine Schwarz, and in the same way if he only succeeds in getting one share, after deducting traveling expenses, &c., attending the same; but, if said Wendell does not succeed in making the purchase, then the said Catharine is to pay the traveling expenses of said Wendell, and he to charge nothing for his services in attending to the business; all the interest which said Harding and Thomas have to other lands and lots, if said Wendell can succeed in purchasing them, they are to be expressly for the benefit of said Catharine, and said Wendell is to have no interest in them whatever. In witness whereof," &c.

Wendell got the note discounted, went to Philadelphia, and, on the nineteenth day of the same month, purchased of John G. Thomas, and Anna E. his wife, (the said Anna E. being one of the daughters and co-heirs of Abraham Sheridan, deceased,) all their interest in and to the seventeen in-lots and four out-lots, it being one undivided third part, for $1,200, and received a conveyance thereof, reciting that, in consideration of the sum of $1,200, to them, the said John G. Thomas and Anna E. his wife, paid by Tunis S. Wendell, trustee of Catharine Schwarz, out of the proper trust money of the said Catharine, they, the [*271] *said John G. Thomas and Anna E. did grant, bargain and sell unto the said Tunis S., trustee of the said Catharine, for her use, and for her heirs and assigns, all their interest in the said seventeen in-lots and four out-lots. That he made other purchases of real estate for the said Catharine, and paid therefor with the money obtained on the $4,000 note; that he has never rendered an account of the money so received by him, and that no part of it has ever been repaid to complainants, and they believe a large balance still remains in his hands.

The bill further states that, on the 10th day of June, 1836, the note at the bank became due; that it was taken up by a new note given by Catharine, and endorsed jointly by Hastings and Wendell, Catharine having procured Hastings to endorse it with Wendell, at Wendell's request; and that this last note was paid by Wendell, on the thirty-first day of August of the same year, out of the trust moneys.

That, on the third day of September, 1836, Wendell stated to John E. that he had an opportunity of selling his share in the Erie property to one Abijah Fross, for $5,000, but, if Catharine wished to have it, he would take a bond and mortgage she held against Joshua Boyer, in part payment, and her note for the balance. John E. replied, if she was willing, he had no objection, and that he would prefer having her purchase it, to a stranger. A few days after, Charles H. Stewart called on Catharine with an assignment of the bond and mortgage, and a note for the balance of the $5,000, to obtain her signature and acknowledgment; but she refused to execute them, stating to

Mr. Stewart that Wendell must wait until the Erie property was sold for his share, which she thought he could well afford to do, as he would receive a large amount for a journey to Philadelphia.

*The parties afterwards becoming dissatisfied with each [*272] other, Hastings was appointed trustee in the place of Wendell, on the 28th day of January, 1837. After the deeds of conveyance for transferring the trust were executed, but before they were delivered, Wendell required Catharine, as a condition of his transferring the trust, to sign the following note, viz:

"$3,980.24. Three years from date I promise to pay T. S. Wendell or bearer three thousand nine hundred and eighty dollars $\frac{24}{100}$ for value received, with interest at the rate of six per cent.

"Detroit, Jan'y 28, 1837."

The demand was a surprise on complainants; and, thereupon, Wendell presented a memorandum or statement on a scrap of paper, in which he charged Catharine for his half of the Erie purchase, the sum of $5,000, and then deducted certain items not intelligible to complainants, leaving a balance in his favor amounting to the sum stated in the note, and insisted she should purchase his interest in the property at the price, and on the terms proposed. She insisted it was not just to require her to account for such profits until a sale was made of the property, and offered to pledge her word that, when a sale was made, he should receive his just proportion; but, he insisting on its being then arranged, she signed the note, to avoid further difficulty. He then required that Hastings should also sign it in his capacity of trustee, which he did, at the request of Catharine.

To show that the $4,000 note in the bank was paid with trust moneys, the bill further stated that John E., at the time Wendell became trustee, was in embarrassed circumstances, and that the trust moneys, to a large amount, with

the assent of Catharine, were applied in payment of
[*273] *his debts; and that, for the purpose of refunding the moneys so paid, John E., on the 10th day of March, 1836, conveyed to Wendell, as trustee of Catharine, a piece of land deeded to him by John B. Godfroy, situate in the county of Monroe. That, on the first day of August, 1836, John E. made a contract for the sale of an undivided half of the land to Lewis Godard, for $7,500, of which the sum of $3,841.29 was paid in cash, and the balance secured by a mortgage; that Wendell deeded the premises to Godard, and received the money, and took a mortgage from Godard, as trustee, for the balance; and that, on the 31st day of August, 1836, he gave Catharine credit for the $3,841.29, in the account he kept of the trust funds, and at the same time charged her with the payment of the $4,000.

The bill further states that Wendell, much of the time, had large amounts of trust moneys on hand, and derived great advantage from their use; that the management of the trust property occasioned but little trouble; and that by the terms of the trust, expressed in the deed creating it, Wampole and Wendell, his assignee, were to retain and reimburse themselves, out of the rents, issues, and profits, of the trust property, all such charges and expenses as they were put to in the execution of the trust; but no provision was made for paying the trustee for his services. That there were many incidental advantages attending the trust; that it was understood, when the trust was transferred to Wendell, these incidental advantages should compensate him for his services. That Wendell had sold the note; that it belonged to John L. Schoolcraft, who had placed it in the hands of an attorney for collection, and that Catharine and Hastings had been called on to pay it. That the Erie
[*274] property purchased of Thomas *and his wife was not worth over $2,000, and had not been sold.

The defendant put in a plea of an account stated, and agreed upon, at the time the trust was assigned to Hastings, and of a covenant from Hastings and John E., in the deed of assignment, to indemnify him against all acts done by him as trus-

tee, &c. The plea after argument was ordered to stand for an answer, with leave to complainants to except.*

Defendant afterwards put in his answer, admitting the trust as stated in the bill, the assignment of it to him, and that he acted as trustee until Hastings was appointed. That early in March, 1836, John F. Wight applied to him to purchase Catharine's share in the Erie property, provided the other two shares could be had; but he was unwilling to purchase one share only, and proposed, in case one or both of the other shares could be procured, to give for the whole $30,000, or for two of the shares $10,000 each. A day or two after, John E. called on defendant, and said he had received a proposition from Wight for the Erie property, provided the two shares, or one of them, held by the co-heirs, could be had; and defendant replied Wight had made the like proposition to him. John E. said the shares could be bought low for money, if the owners had not heard of the rise of property at Erie,—probably for $2,000,—and proposed defendant should raise the money and go to Philadelphia and purchase the interest of the co-heirs, in all the real estate held by them and Catharine as heirs of Abraham Sheridan, deceased, as well the Erie property, as other real estate; saying, if defendant would do so, he would pay him well for it. Defendant refused to accept the proposition, but stated he *would raise the money from the Bank of Michigan, and [*275] make the purchase, for one-half of the profits; that he would procure the money for ninety days, and, as Mr. Wight would pay down one-third of the purchase money, he could pay the money borrowed, out of it; and that he should want to take with him $4,000, instead of $2,000, to ensure the object, and suggested to John E. to converse with Catharine on the subject. A day or two after this conversation occurred, John E. called again, and proposed to defendant to raise the money, and purchase one or both of the shares, and he should have one-half of the purchase, and receive one half of the profits, and, if he

*See a former report of this case, in Harr. Ch. R. 395.

failed in making the purchase, he should receive nothing for his time and services, but should be paid his expenses. Defendant accepted the proposition, and, to save the necessity of defendant's procuring an endorser, to comply with the bank's regulations, it was agreed the note on which the money was to be raised should be signed by Catharine, and endorsed by defendant; and, to save a multiplicity of conveyances, that the property should be conveyed to him as trustee—as well his own share, as that purchased for Catharine. Soon after this agreement was made, on John E.'s making some remark in regard to the profits defendant would receive on the whole purchase, defendant said he would exclude from his share in the purchase all lands other than the Erie property; and, with this variation, the agreement was finally concluded. A day or two after this, Catharine and John E. called on defendant, when he presented the note to Catharine for her signature, remarking it was to raise money to make the purchase, and she signed it, saying she hoped he would succeed. On this note, defendant obtained the money of the Bank of Michigan, on his own account and responsibility; and, to avoid all misapprehen-

[*276] sion, he drew up the *agreement in writing mentioned and set forth in the bill, dated March 7th, 1836, which was signed by himself and John E. He believed Catharine had a full understanding of the matter, when she signed the note. She was particularly interested in having the purchase made, to effect an advantageous sale of her interest, and John E. was accustomed to attend to her business, in matters relating to the trust. Defendant was in the habit of communicating with him, and through him with Catharine. Denies John E. protested against Catharine's signing the note, or that it was not understood by John E. that the money was to be raised on a note signed by her. Does not know whether Catharine saw the written agreement, or not. The note was discounted by the bank, and defendant received on it $3,938. On the 19th day of March, he purchased of John G. Thomas and Anna E., his wife, the said Anna being one of the co-heirs, her undivided third of the real estate held by her and the

other co-heirs of Sheridan, for $3,000, the said estate embracing the Erie property, and other property in Pennsylvania. Her interest in the Erie property was estimated at $1,200. He received a conveyance to himself, as trustee of Catharine, and, on his return to Detroit, gave full information to John E. and Catharine, of what he had done. The balance of the money, amounting to about $778, he was about to repay to the bank, on the note, when John E. stated that Catharine and himself wished to use it, and requested defendant to pay it to them, assuring defendant that other means should be provided for paying the note. He said it should be paid out of the proceeds of a tract of land belonging to him; and defendant let them have the money. Wight did not call and make the proposed purchase. In June, a short time before the note at the bank became due, one Abijah Fross offered to purchase of defendant one-third *of the Erie property, for $10,000;—one-third to be paid [*277 down, and the residue to be secured on the property;— stating at the same time that he would purchase the other third on like terms, if he could raise the money. Defendant communicated Fross's offer to John E. and Catharine, and advised them to accede to it, as the note was approaching maturity, and he wished to take it up. They objected, and said they would make other provision for the payment of the note. John E. said he would pay it out of the proceeds of real estate he had in the county of Monroe, and which he expected to sell to one Lewis Godard. Defendant expressed his wish, at any rate, to sell his share to Fross, to which John E. and Catharine replied by offering to purchase it, and pay him what would be his share of the profits, if sold. They offered to give him a bond and mortgage they held against one Joshua Boyer, for near the amount, and their note for the balance, which defendant agreed to accept; and, in making up the amount to be paid, defendant put the consideration paid for the property at $2,000, instead of $1,200, and they were to pay the $4,000 note at the bank. Defendant requested Charles H. Stewart to prepare an assignment of the mortgage, and the other papers, which, as defendant was afterwards informed by Stewart, were prepared

and presented by him to Catharine to be executed, but that she refused to execute them. John E. afterwards called on defendant, and stated they had concluded not to part with the mortgage. Thereupon, defendant proposed to relinquish his trust, and requested Catharine to appoint another trustee, and set off to him his share of the property. They acceded to the appointment of a new trustee, and again offered to purchase his interest on the terms above stated, but by a different mode of payment, viz: their note at three years, with interest at six [*278] per cent., to be also *signed by the new trustee, which defendant agreed to. When the $4,000 note became due, June 10th, 1836, John E. and Catharine sought a renewal of it, and a new note was given, endorsed by defendant and Hastings. Denies the endorsement of Hastings was procured at his request, or that the renewal was on his account. Upon the agreement for the relinquishment of the trust, John E. informed defendant that Catharine had appointed Hastings her trustee. Charles H. Stewart was employed to prepare the necessary deeds and papers, but, before they were prepared, defendant exhibited to John E. a statement of the amount due him for his interest in the Erie property, similar to the one made and exhibited to him and Catharine on the agreement for a sale to them for the Boyer mortgage. This statement was made by charging $5,000 as the value of defendant's interest—that being half the amount offered by Fross for one-third—and deducting therefrom half the agreed consideration of the purchase, being $1,000, and the interest thereon, and half the expenses incident to the purchase, adding interest from the time John E. and Catharine finally agreed to purchase being about the latter part of August, making a balance due defendant of $3,980.24. He also exhibited to John E. an account of all other matters between him and John E. and Catharine, including the balance of the $4,000 paid to John E. and Catharine at their request, upon which there was a balance due him of $180.59, making, in all, the sum of $4,160.83, the sum mentioned in defendant's plea; and John E. was fully satisfied and concurred therein.

After the papers for conveying the trust were prepared, January 28th, 1837, defendant and complainants met for the execution of them, when defendant again exhibited his statements and accounts, and all matters growing out of the trust and purchase were then fully adjusted and *set- [*279] tled, and Catharine and Hastings signed the note to defendant for $3,980.24. Catharine made no objection to signing the note. John E. also executed a note to defendant for the $180.59, to be paid out of moneys which defendant expected to receive for him. Defendant denies he required Catharine to sign the note, as a condition of transferring the trust; or, that she was taken by surprise; or, that she did not act voluntarily in signing it; or, that any part of the statement or account exhibited by him, was unintelligible; or, that she stated it was not just or right to require her to account for such profits until a sale, &c. After the papers had been executed, but not before, Catharine remarked she thought Mr. Wendell might have waited for his share until the property had been sold; which was the only remark made by her during the whole interview, or at any other time, to the knowledge of defendant, indicating any other than full and entire satisfaction. Neither Catharine nor John E. ever expressed any dissatisfaction with the settlement, to defendant, before filing the bill. Defendant had been trustee for nearly eight years. He had not charged or received any compensation, and, on surrendering the trust, was induced not to make any, in consequence of the profits on his interest in the purchase.

The note at the bank was not paid with money held in trust for Catharine. A part of it, $3,841.29, was paid with money received, of Godard for the Monroe land, and the balance, $158.71, was furnished by John E. out of his own funds. Defendant had sold the $3,980.24 note to Schoolcraft. Does not know the present value of the Erie property; it would probably be valued at much less than when he sold it.

John E. was much embarrassed in his circumstances when defendant was appointed trustee, but the trust *money was not used to pay his debts, with an understand- [*280]

ing it would be replaced by him. He was under the necessity of selling some real estate to pay his debts, which was purchased by defendant, and paid for out of the trust money, and a deed was taken by defendant, as trustee. Denies the land in Monroe, sold to Godard, was conveyed to him on the 10th day of March, 1836, as trustee for Catharine, with a view of replacing trust moneys that had been used to pay John E.'s debts. Defendant was absent from Detroit when the deed was made to him by John E., and did not know of the existence of such conveyance until his return, in April, from Philadelphia, when John E. and Catharine applied to him for the balance of the money left after the purchase of the Erie property ; and John E. assured him he would provide the means for paying the note at the bank out of the avails of the Monroe property, which he expected to sell to Godard, when defendant received the deed from him, and held the land as a fund for the payment of the note. Defendant conveyed the land to Godard, but knows nothing as to the form of the mortgage taken from Godard by John E. He does not recollect having ever seen it. With the $3,841.29 received of Godard, and $158.71 advanced by John E. out of his own private funds, the $4,000 note was paid ; and entries were made of these transactions in the trust books, that there might be some record of them. The payment of the note, and the receipt of the moneys with which it was paid, were placed opposite each other, and were never regarded as the moneys of Catharine.

Charles H. Stewart, the only witness in the case, proved the execution of the deed transferring the trust from defendant to Hastings. Two or three weeks previous to that time, there was a settlement between John E., Catharine, and de-
[*281] fendant, which was admitted by the parties *to be a full and final adjustment of all matters growing out of the trust, and witness was directed to prepare an assignment of a mortgage on certain property in the city of Detroit, to secure to defendant the balance so admitted to be due. Witness did so, and it was either executed, or agreed to be executed by John E., and, by his desire, was presented to Catharine for execu-

tion, in the presence of John E., but she declined executing it, saying they wanted that particular property for other purposes. The means witness had of knowing that the settlement was a full and final settlement, were the statements and admisions to that effect, by the parties. The particulars of the settlement did not transpire in the presence of witness. No change of the trust was then contemplated, but a mere security, by defendant, of an admitted balance. On the refusal of Catharine to execute the assignment, the defendant required to be relieved from his trust, and then it was that Hastings was selected. Before the transfer of the trust, or at that time, a note was executed by Hastings, as trustee, to defendant, for the balance admitted to be his due, according to the previous arrangement. Defendant wished to be relieved from his trust, and to get security against his responsibility as trustee, and evidence of the balance due him, at one and the same time. Witness recollects that John E., and, he believes, Catharine, at the time of the proposed assignment of the mortgage, said the defendant's account was too high. They did not say this as protesting against it, or as refusing to pay it. Wendell required to be secured in the amount due to him, and also to be released from his trust. Both requisitions were acceded to, and no objection was made, at any time, to secure the balance. When the papers were prepared, they were executed without question.

**Joy & Porter*, for complainants. [*282]

I. It is clear, from the whole case, that Wendell, in his journey to Philadelphia, and the purchase of the Erie property, was acting in the capacity of agent and trustee of Mrs. Schwarz, and not on his own behalf. The money was all furnished by her, and he was acting throughout for a compensation, which he was to realize out of the expected profits. The colorings and allegations set up in the answer, to prove it to have been a joint speculation, (such as the statement that he obtained the money on his own credit and responsibility, the

offer by Mrs. Schwarz to buy his share, &c.) and the various matters by which he seeks to divest himself of the character and responsibility of an agent, are not responsive to the bill, and not proved, and therefore must be taken to be, as they really are, false. 2 J. C. R. 88; 13 Ves. R. 47; 7 Ves. R. 587; 2 Ball & Beat. R. 382; 1 Wash. C. C. R. 224; 1 Mumf. R. 373; 2 Caines Ca. 66; 1 J. R. 580.

He had no right to take a deed, except as trustee for her; and, had he done otherwise, or taken a deed to himself, individually, of any part of the property, it would have been a fraud, and this Court would have compelled him to transfer it to Mrs. Schwarz. His statement about the agreement to take a deed thus, *to save a multiplicity of conveyances*, is responsive to nothing in the bill, and is also inconsistent with the tenor of the executed agreement, which was that he should be compensated, by receiving *half the profits of the Erie property*, when sold, and *not half the title*. He could not take title to himself personally. 10 Ves. R. 394; Story on Agency, 194.

Even if Wendell had furnished the money himself, as he agreed to do, he could have had no right to purchase the property for any one except Mrs. Schwarz. Had his [*283] *conduct been fair, he could have enforced his agreement, in equity, by a bill to obtain a sale of property, and a division of the profits. But he did not furnish the money, or any part of it. The note was finally paid, not by him, but by Mrs. Schwarz. In contemplation of law, the money obtained from the bank was hers throughout. It was obtained for her, expended for her, and finally repaid by her.

II. The sale by Wendell can only be viewed as a speculation by a trustee out of a *cestui que trust*, by a sale of an anticipated interest in the profits of a purchase made by him, on joint account, even upon his own allegation, but in reality with her money.

The allegations in the answer, tending to show that the agreement and sale, after the offer made by Fross, were with and to Mrs. Schwarz and her husband, jointly, are not respon-

sive to the bill. They are, moreover, inconsistent with the facts appearing. The note executed for the alleged purchase, was signed by no one but Mrs. Schwarz, and her trustee, Mr. Hastings. The Boyer mortgage, which was to have formed a part of the consideration, was her property alone. The plea alleges that the note was for the amount found due from Mrs. Schwarz to Wendell, and the answer admits that the balance was made up of the Erie purchase profits, which were conveyed to her by Wendell.

The trustee says he bought for the joint benefit of his *cestui que trust*, and himself, but without advancing any money. Upon the best state of the case which can be made out for the defendant, it appears that he managed to procure his *cestui que trust* to assume the whole responsibility, repay the money borrowed, assume all the risk of any possible loss in the speculation, and then pay him *$4,000 for his chances [*284] for profits. This is truely a handsome operation to be made out of a *cestui que trust*.

Upon this state of facts, will not this Court, upon the prayer of the injured *cestui que trust*, lay its hands upon this transaction, and compel the trustee to refund the money which he has wrongfully obtained, and pay, or take up, and indemnify his *cestui que trust* against the note thus wrongfully obtained, and for which he has received value?

We take the law to be perfectly clear that no transaction of this kind,—no trade,—no business tranaction of this nature,—between a trustee and *cestui que trust*, can stand, if the *cestui que trust* chooses to set it aside. The principle, as we understand it, is one of universal application, founded on policy, and has *no regard to the fairness of the transaction, character of the parties, or anything of that nature.* It is based upon this, that, where parties are so situated with regard to each other, one being a trustee holding the property of the other, and the other being a *cestui que trust*, *the trustee may, from his position, acquire an influence over his cestui que trust, which gives him an advantage in all matters of business, and places the other comparatively in his power.* That, from the

difficulty of examining cases of this nature, from the infirmity of human testimony,—the difficulty of sifting the motives of parties—courts of equity have established a general rule, that *no transaction* between parties so situated shall stand, if the *cestui que trust* wishes to set it aside. Courts say that this is the only principle which will save the weaker party from becoming the victim of overreaching, or artful, or designing men. It is a principle founded on reason, and sound sense, and good policy. 1 Story Com. on Eq. 307, 310, 316, *et seq.;* 10 Ves. R. 394; 6 Ves. R. 268; 9 Ves. R. 244, 295; 2 Sch. & Lefr. [*285] 500, 665; 1 Cox Ca. 119; Talb. Ca. *111; 2 Bro. R. 427; 10 Eng. Cond. Ch. R. 190; 8 Eng. Cond. Ch. R. 312.

A variety of cases have been decided, and relief afforded in equity, where, from the nature of the transaction, and the situation of the parties, fraud or imposition might be presumed. See, for instance, 8 Cow. R. 370; 3 P. Wms. R. 139.

The above cases, with many others, establish the doctrine beyond a question, that, in cases where the parties stand in the confidential relations of attorney and client, guardian and ward, trustee and *cestui que trust*, they shall not bargain with each other, and, if they do, the *cestui que trust*, the ward, or the client, shall, if they please, set aside the sale, and be restored to the rights which they formerly possessed.

Courts of equity adopt the broad and sound principle, that, where these relations exist between the parties, they cannot deal with each other on equal terms. The confidence which is reposed, the means of influence which one party holds, gives him so much the advantage, that it is dangerous, and may be ruinous to the other, to suffer them to contract. And it is so difficult to weigh this influence, to investigate these cases, and ascertain whether any advantage has been taken, that courts have adopted a rule, which puts the sting of disability into the contract. The parties should not deal with each other. It matters not how fair the transaction, it cannot stand. The Court will not inquire into this point. This is fully established by the above cases. Although in the various cases, various

reasons are assigned for the principle, yet, in all the principle is established. And, in several, it is broadly laid down that, where these confidential relations exist, the parties cannot deal on equal terms, and therefore they shall not deal at all

*III. But in this case, were there no such rela- [*286] tions existing, the transaction is such that this Court ought not to permit it to stand. It is such an one as shocks the conscience. The advantage taken is so great, that it is, upon its face, an outrage upon *honor and common honesty*. To procure money upon my note to buy land for me, and to receive as a compensation half the profits when sold, and then pay the note out of my money, and compel me to pay $4,000 for half the profits, in advance, is upon the face of it, an outrageous transaction; and we are fully persuaded that, if there were no other feature in it, this Court would say that the advantage taken, is so monstrous, that it cannot be sustained. It falls directly within the class of cases where the Court will set aside the trade for inadequacy of consideration. 2 Bro. R. 179; 7 Ves. R. 30; 8 Ves. R. 133; 9 Ves. R. 234; 10 Ves. R. 470, 292, 209; 14 Ves. R. 28; 13 Ves. R. 95; 3 Ves. & B. 187; 2 Sch. & Lefr. 395; Sugd. on Vend. 226.

IV. It may be argued that here too much time has been permitted to elapse, and that we come in too late. But this is not so. We have, in a case of this nature, the right to file our bill at any time when the note is sought to be enforced against us.

How could we know that Wendell had sold it? And if he had not sold it, could he enforce it against us; and might we not file our bill whenever he should seek to enforce it? Besides, he has got a security from us, which it is unconscientious that he should retain.

Mrs. Schwarz was not, until recently, before filing her bill, acquainted with her legal rights. It is sufficient that, whenever she does become acquainted with her rights, she seeks to redress them. Simple lapse of time will not bar her rights in a case of this nature, unless with a full knowledge of her rights, she confirms the trade. 12 Ves. *R. 374; 5 Pet. [*287]

Cond. R. 150; Cooper Eq. 146; 5 Ves. R. 678; 11 Ves. R. 226; 9 Ves. R 292; 2 Ves. R. 272, & note; 14 Ves. R. 91; 2 Atk. R. 119.

V. The only question, then, is, whether the plea and answer contain a bar to this inquiry, or whether this transaction may not yet, notwithstanding the matters in the plea and answer alleged, be made right in this Court.

The plea is not sufficient, and, if sufficient, constitutes no defense to this suit.

It is not sufficient, because it does not aver that the account, which was stated, is a true and just account. This is necessary, though the bill do not impeach the account for fraud or error. 3 J. C. R. 388; 1 Beames Pl. 230; 3 Atk. R. 70; Cooper Pl. 279; Mitford Pl. 260; 4 Paige R. 195.

Another reason is, that the plea does not put in issue the matter charged in the bill, nor deny the constructive fraud alleged, nor the imposition. The plea should deny *the facts* which constitute our ground for redress and relief. 4 Paige R. 196; 3 Paige R. 277; 2 Atk. R. 119.

As to the covenant of indemnity, we say, first, that it has no application at all to this case, from its very terms, and if it can only operate as a release, and is subject to the same objections on the account stated, or the note,—that it was unfairly obtained,—it would be pleading one part of an unjust settlement to cover up and prevent the investigation of all the antecedent frauds. Story Eq. Pl. 613, &c.; Mitf. Pl. 261; 2 Sch. & Lefr. 721; 6 Madd. R. 62; 2 Sim. & Stu. 279; 3 Paige R. 277.

Neither the plea nor the answer denies what we set up as an equitable ground of relief. They simply assert that the account which was rendered was just and true, and was acquiesced in. &c. Now, as we have shown, this is not enough, unless [*288] he denies the circumstance which we *allege, to wit, the transaction relative to the Erie property, by which Wendell makes at least $4,000 out of his *cestui que trust*, which was allowed in the settlement, and makes the settlement unjust. And we may read the answer, admitting this fact, to show that the account rendered, which included this charge of $4,000 for

profits in that transaction, was not a just account, notwithstanding Wendell's assertion that it was just and true. This Court is to say whether it was just, upon the facts before it. Mitf. Pl. 299; 4 Paige R. 178; 2 Paige R. 574.

Goodwin & Collins, for defendant.

1. The answer, (except as to the covenant set forth in the plea, which is proved by the testimony of Stewart,) is responsive to the bill, and is evidence. It is evidence as to all contained in it responsive to the bill, whether it be the stating, charging, or interrogating part of it. All the allegations so responsive are to be taken as true, unless contradicted by two witnesses, or one witness and pregnant circumstances. 3 Barb. & Harr. Eq. Dig. 383; 2 Pet. Cond. R. 285; 3 id. 417, 424; 1 Wend. R. 583; 3 Paige R. 557; 1 Cow. R. 711; 4 Paige R. 368.

This rule has been established in practice as long as there has been a Court of Chancery in Michigan, and is not now an open question. The rule contended for by the complainants, as laid down in the cases cited by Counsel, does not exclude the answer, or any part of it. It is that where "*new and distinct* matters are set up in *avoidance*," and there is a replication, those matters must be proved. None of the matters set forth in the answer are *new and distinct* matters. They are part and parcel of the transactions upon which the complainants seek relief, and of which they have called for a discovery. The case in 3 Mass. R. 278, is to this effect, and no more. See also *2 McCord Ch. R. 90, 101, 102, 344, 350; *Rocks* v. [*289] *Postlethwaite*, Coop. Ch. Ca. 161; 14 J. R. 63, 73; 8 Cow. R. 394; *Green* v. *Vandman*, 2 Blackf. R. 324.

Even the strict rule of the Southern cases cited, does not support the complainant's case. The rule, in these, as stated, is "that the answer is not evidence when it asserts a right affirmatively, in opposition to the plaintiff's demand." But they agree that *everything stated in the answer, responsive as to the creation of the original liability charged, must be taken*

together. But where the original liability is once admitted by the answer, there is no escape from it but by proof." 2 Cow. & H. notes to Phil. Ev. 268.

Upon this rule, all of the answer is evidence in the case. The bill seeks relief from a note, upon a variety of facts alleged to show a want of consideration, imposition and fraud. The answer denies that any such gounds of relief do, or *ever did exist*, and gives a full history of the transactions referred to, showing there were none. The "liability charged," is repelled from beginning to end.

II. This is not a case of a purchase of trust property by a trustee, nor do the cases on this subject apply to it.

It is contended that the trustee, while the relation exists, cannot buy of the *cestui que trust* the trust property. This is not such a case, and if it were, the position is not true. The *cestui que trust* is, in equity, the owner of the trust property, and may alien, demise, and dispose of it, and even when a *feme covert*, encumber it for her husband's debts, and may sell and dispose of it to the trustee, by a fair bargain, clear of fraud and imposition. 1 Madd. Ch. 113, 453, 456; 2 Kent. Com. 162; 7 J. R. 548; 6 Ves. R. 625; 9 Ves. R. 246; 12 Ves. R. 373; 3 Meriv. R. 208; Newl. on Cont. 453; 1 Cruise Dig. 500.

III. It is insisted, on the part of the complainants, that the purchase made by defendant, of the Erie property, [*290] *was with trust funds of Mrs. Schwarz; and that the trustee cannot use the trust funds to make profit for himself. If the facts were so, yet, if it were done with the agreement of the *cestui que trust*, and a consideration is rendered for it, labor and service being performed therefor, it is not perceived why such an agreement, fairly made, cannot be sustained; and, more especially, why a subsequent settlement of such an agreement performed, should not be sustained.

But it is not true that trust funds of Mrs. S. were used for the purchase of the Erie property; it was not understood or agreed that they should be so used, nor were they so used. The agreement between Schwarz and Wendell was, that the purchase of the Erie property should be made by Wendell, with

funds to be raised by him at the Bank of Michigan, upon a note, to which Mrs. S. was to be a party, to save the procuring another endorser; that Wendell should own one-half the property, and have half the profits; that, on Wendell's return, the sale to Wight should be made, and, out of the proceeds, the money was to be repaid. Wendell so raised the money, and made the purchase; and let Mr. and Mrs. Schwarz have the balance of the money on hand, (Wight not having purchased,) on Schwarz's assurance that, if necessary, he would pay the note out of a sale of land to Godard. A deed of this land was made to defendant during his absence, and, on this agreement, *it was tendered to him by Mrs. S. and received under that agreement.* Wight not appearing, and the note approaching maturity, Fross proposes to purchase, and Wendell urges a sale, and payment of the note. On Mr. and Mrs. S.'s objecting, Wendell proposed to sell his share to Fross, and Mr. and Mrs. S. then propose to buy it, and pay him by the Boyer mortgage, &c., Mr. S. proposing as before, to pay the note out of the proceeds of *his sale to Godard. Mrs. S. then con- [*291] cluded to retain the Boyer mortgage, and other security was proposed and finally given. Schwarz obtained a renewal of the bank note, and it was subsequently paid out of the proceeds of the land, as agreed. The purchase money of the Erie property, then, was raised on a note which was finally paid out of property and funds of *John E. Schwarz*, and not trust funds of Mrs. S., and had no connection with them.

The deed of the Monroe land to Wendell took effect only on its delivery. 9 Cow. R. 255. On its face, its legal operation was to convey the property absolutely to W. Under the agreement under which it was delivered and received, it was held for the purposes provided for thereby. If, in the absence of the agreement, any trust arose, other than that on the face of the deed, it was a resulting trust for John E. And a resulting trust arising by parol, is destroyed by parol; as in this case, by the agreement between Wendell and J. E. Schwarz. Besides, the agreement has been fully executed, and there is nothing left

unexecuted to be settled in regard to it. 1 Cruise Dig. 403, 422; 4 Kent Com. 300; 2 J. C. R. 405.

IV. There was a full settlement between the complainants and the defendant, of all matters and transactions between J. E. and Catharine Schwarz, and the defendant, and particularly growing out of, or connected with the trust, at the time of its surrender; and at the same time the covenant was executed set forth in the plea. By the plea and answer, it will be seen, that there was then a full, fair and final account, preceding said settlement, and consummated therein, as to all said matters. These constitute a full bar; and the covenant has, it is contended, the full force of a *release*. 1 Madd. Ch. 100; Mitf. Eq. Pl. 259; 2 Cond. Ch. R. 116, 449; 1 Swift Dig. 302. [*292] *1 T. R. 446; 8 T. R. 483; 4 Paige R. 368, 481; 3 J. C. R. 569; 1 Young R. 306; 1 Hopk. R. 239; 1 Barb. & Harr. Eq. Dig. 55.

It is shown clearly by the facts in the case, that the balance claimed at the time of the settlement, was fully understood and acknowledged. Not only therefore is all imputation of fraud removed, but it would be difficult to present a case of a more full, fair and complete adjustment, and final settlement, of any matter whatever.

Besides, the settlement and bond of indemnity, were executed and accomplished with the concurrence of Mr. Hastings, the new trustee, as well as Schwarz, the husband.

V. Not only was there this settlement, but the complainants lay by several years thereafter, before bringing their bill, or making any complaint. Upon the grounds upon which they complain, this is an important fact, and should itself be a ground for refusing any relief. The times have changed. The property has, it appears, depreciated, when it might have been sold at the time, for the proposed price; and the note has been transferred, and the avails of it most likely exhausted. Such is the doctrine recognized by this Court, in *Jones* v. *Disbrow*, Harr. Ch. R. 102. See also, 1 Madd. Ch. 99, 417; 2 Cow. & H. notes to Ph. Ev. 339; 3 Har. & J. 43; 1 Edw. R. 417; 2

Paige R. 556; Newl. on Cont. 466; 10 Ves. R. 423; 2 Cond. R. 449.

Wendell was by agreement to be paid for his services. In his answer, he states them to be worth $500 a year, for the eight years, and, in consequence of his interest in the Erie purchase, he charged nothing therefor in the settlement. A trustee is entitled to compensation where there is an agreement to that effect, though not in the trust deed. And here the agreement is sworn to in the answer, in response to the bill. Atk. R. 59; 1 J. C. 27.

*VI. It was understood when the Erie property was [*293] purchased, that it should be directly sold, and the consideration repaid, and the profits realized. This contract, which was perfectly fair, the parties were bound to fulfill, and a court of equity would compel the refusing party to do so, and that without injurious delay. 1 Madd. Ch. 418; 2 Sch. & Lefr R. 604. The parties here, instead of carrying it into effect as originally agreed, do so in another manner;—that is, S. and his wife refuse to do so as originally proposed, but themselves become purchasers of Wendell's interest. This is just and equitable, according to the established principles of this Court.

VII. This is not a case in which the Court will or can furnish any relief. The note has been sold, the holder of the note is not a party to this suit, and not only so, but, when Wendell purchased the Erie property, he paid the consideration, to wit, the funds raised at bank. Schwarz repaid this, by payment of the note at bank under the agreement for the sale by Wendell to him and Mrs. S. of his interest. Will the Court now annul the sale, and compel Wendell to take back his half of the Erie purchase, and repay the consideration and interest, and pay and take up this note, and besides, (if the Court adopt the equitable rule they must,) put the parties in *statu quo?* To do all this, in this case, at this time, under the circumstances, would be iniquitous and tyrannical in the extreme.

The bargain with Mr. and Mrs. S. prevented Wendell from selling to Fross. The Court *cannot, now, put the parties back where they were*, but to cancel the agreement would make

Wendell pay all the money above mentioned, and leave him, with his former share of the Erie property on his hands, with the price depressed, and the sale prevented by the acts [*294] of the complainants, which they seek to avoid; *and moreover, for eight years' services, worth $500 per year, deprive him of all remuneration and indemnity. Further, Hastings and Mr. S. were parties to the agreement, and Hastings is to the note, and the legal effect of the note is that Hastings is personally liable. Will the Court relieve him under these circumstances, and especially when Mrs. S., being a *feme covert*, is not liable at law on the note? And Schwarz himself, who is a party and prime mover in all the transactions, should (if any other than the parties to the note) be compelled to pay. Let the Godard mortgage, and the other portion of the Stony Creek property, be applied by complainants to its payment; and these now are, it would seem, in the hands of Mrs. S. and Mr. Hastings, her trustee.

The bill should be dismissed, and the parties left where they have placed themselves.

The Chancellor. The question has been discussed at some length, how far the defendant's answer is evidence. The general rule is, that whatever is responsive to the bill is evidence for, as well as against, the defendant. But there is frequently much difficulty in applying the rule, and regard must always be had to the case made by the bill, in determining what is, and what is not responsive. Is the fact stated in the bill, and answered by defendant, material to complainant's case, that is, must it be proved to entitle him to relief; or is it a circumstance from which such material fact may be inferred?—for the complainant may prove his case, by either positive or presumptive evidence. If it is, the answer, as it regards such fact, is responsive to the bill, and is evidence in the cause. It may also, sometimes, be evidence of a fact not stated in the bill; as where the bill sets forth part of complainant's case, only, instead of the whole, and the part admitted [*295] *and stated in the answer shows a different case from

that made by the bill, and is not matter in avoidance merely. As where a bill, filed to redeem stock, alleged it had been pledged for five hundred dollars, and the answer stated it was pledged for eight hundred dollars, in addition to the five hundred dollars stated in the bill, the answer was held to be responsive. *Dunham* v. *Jackson*, 6 Wend. R. 22. Here the answer, instead of being responsive to a particular fact stated in the bill, was responsive to complainant's case, which the answer denied, by showing a different case. But where the answer does not show a different case, but, admitting the case made by the bill, sets up new matter in avoidance of it, the answer is not evidence of such new matter. As where the defendant sets up usury, in his answer to a bill filed to foreclose a mortgage. *Green* v. *Hart*, 1 J. R. 850. Such are the general principles, to be deduced from the cases, for our guide in determining what parts of an answer are responsive to the bill. *Hart* v. *Ten Eyck*, 3 J. C. R. 62, *and note at p.* 92; *Beckwith* v. *Butler*, 1 Wash. C. C. R. 224; *Ringgold* v. *Ringgold*, 1 Harr. & Gill, 11, 81; *Hagthorp* v. *Hook*, 1 Gill & Johns. R. 270; 13 Ves. R. 47; 7 Ves. R. 404, 588; 2 Ball & Beat. R. 382; 3 Russ. R. 149; 19 Ves. R. 182; *Attorney-General* v. *Oakland County Bank*, *ante*, 90.

A different exposition of the rule was given in *Woodcock* v. *Bennet*, 1 Cow. R. 711, and also, as it would seem, in *Green* v. *Vandman*, 2 Blackf. R. 324. In the first of these cases, it was held that an answer to statements, or facts, contained in a bill, whether such statements or facts were necessary to make out complainant's case, or related to matter in avoidance of it, merely, was nevertheless responsive, and evidence in the cause. This exposition of the rule is liable to several objections. It makes defendant a witness for himself, to prove his defense, as well *as a witness against himself to prove [*296] complainant's case, and, if it be right that the matter in controversy between the parties should be settled by the defendant's oath alone, unless disproved by two witnesses, or one witness and corroborating circumstances, then his answer, in all cases, should be evidence, whether responsive in either of

the senses above stated, or not. To make the rights of parties in this respect depend upon the drawing of a bill, looks too much like sacrificing right to professional skill. Defendant is not bound, nor can he be required, to answer any statement or fact in the bill not necessary to make out the complainant's case; and, when he does, it is voluntary on his part, and his answer, for that reason, should not be binding on complainant, as he would, in no case, be likely to disclose what would make against himself. Defendant cannot be a witness for himself. Nor is there any hardship in the rule; for he may, by a bill of discovery, make complainant a witness for him on the same terms that he is a witness for complainant. *Clason* v. *Morris*, 10 J. R. 542, and *Field* v. *Holland*, 6 Cranch R. 24, are cited by the Court in *Woodcock* v. *Bennet*, but neither of them support that case. In each of these cases, the part of the answer in question was responsive to a fact stated in the bill, which it was necessary for complainant to prove, to make out his case.

Wendell's answer in all its material statements, is responsive to the bill; and the case must be decided upon the answer, and the testimony of Stewart. So far as the case charges defendant with fraud, it is clearly disproved; and I should not hesitate for a moment to dismiss the bill, if the relation of trustee and *cestui que trust* had not existed between the parties, when the several transactions stated in the bill took place. There are certain relations existing in society, necessary for its prosperity and [*297] well *being, and which it is the policy of the law to foster and protect. With that view, and to keep individuals from availing themselves of these relations for selfish purposes, the law has, in some cases, imposed a disability, on persons so situated, to deal with each other on the same terms, as those on which they are allowed to deal with third persons. The relation of trustee and *cestui que trust* is one of this description. A trustee to sell cannot purchase the trust property. So fully satisfied are courts of equity of the necessity, in order to secure the faithful execution of the trust, of removing from the trustee all hopes of personal gain, or advantage to himself, that he is

not allowed to purchase the trust property for himself or another, at public or private sale; and, if he does, the sale will be set aside, or a re-sale of the property will be ordered, for the benefit of the *cestui que trust*, if he ask it in a reasonable time, however fair and honest the transaction may appear, on the part of the trustee. "If," says Lord Eldon, in *Ex parte Bennett*, 10 Ves. R. 385, "a trustee can buy in an honest case, he may in a case having that appearance, but which, from the infirmity of human testimony, may be grossly otherwise." The law on this point is too well settled by adjudged cases, and the policy and reasonableness of the rule too obvious, to be departed from. *Campbell* v. *Walker*, 5 Ves. R. 678; *Ex parte Bennett*, 10 Ves. R. 381; *Davone* v. *Fanning*, 2 J. C. R. 252.

A trustee may, however, purchase trust property of his *cestui que trust*. But courts of equity look upon such transactions with so much jealousy, and there is so much difficulty in sustaining them, that Lord Erskine, in *Morse* v. *Royall*, 12 Ves. R. 372, said he should not have regretted to have found that the rule above stated, extended to the case of a trustee purchasing of the *cestui que trust*. And Lord Eldon, in *Coles* v. *Trecothick*, 9 Ves. R. 244, says, "it *is a [*298] transaction of great delicacy, and which the court will watch with the utmost diligence; so much so, that it is very hazardous for a trustee to engage in such a transaction." In this case, the sale was sustained; but it was a very strong case in favor of the trustee, or, rather, for his father, for whom he made the purchase as agent, and fully justified the remark of Lord Eldon, that if any case could exist for relaxing the rule, by consent of parties, that was one. In *Morse* v. *Royall*, the sale was also sustained. In that case the *cestui que trust* was determined to sell, and frequently teased the trustee to buy, who was reluctant, but finally consented. Some years after the sale, the *cestui que trust* becoming dissatisfied, it was referred to a third person to say what further consideration the trustee should pay, who awarded that he should pay as much more as he had paid in the first instance. On these and other strong circumstances, favorable to the trustee, the sale was

sustained. To set aside such sale, it is not necessary to show fraud. *Fox* v. *Mackreth*, 2 Bro. R. 400. That would be placing the parties on the ground of strangers, dealing with each other at arm's length. The Court should be satisfied, not only that there was no fraud, but, that no use had been made by the trustee of the relation existing between him and the *cestui que trust*, to bring it about; that it was fair in all its parts, and such a transaction throughout as the trustee himself would have approved of, had it been with a third person instead of himself. When the Court is fully satisfied on all these points, the sale, or contract,—for it is not necessary that it should be a sale of trust property,—should be sustained; when not, it should be set aside.

I cannot look upon the agreement for the purchase of the two-thirds of the Erie property in any other light, than as a joint speculation between Wendell and Mrs. Schwarz. [*299] *Mrs. Schwarz had inherited one-third of the Erie property from her father, Abraham Sheridan, deceased, and Wendell held this, and other property, amounting to $10,000, or more, in trust for her. A few days before the agreement, Wight applied to Wendell, to purchase Mrs. Schwarz's share, if the other two-thirds, or one of them, could be procured, and to give $30,000 for the whole, or $20,000 for two-thirds. Wight, about the same time, made application to Mrs. Schwarz, or to her husband, John E., who called on Wendell, and stated the shares could be bought low for money, if the heirs residing in Philadelphia, to whom they belonged, had not heard of the rise of property at Erie; and proposed to him to raise the money, and purchase them, offering to reward him well for his services. This Wendell refused, unless he could have half of the profits. Nothing further was done at this time; but, a day or two after, John E. called again, and agreed to Wendell's proposition. A day or two more elapsed, when the written agreement of March 7th was drawn up by Wendell, and signed by him and John E. At the same time, a note for $4,000 was signed by Mrs. Schwarz, and endorsed by Wendell, on which the money was obtained at the bank to make the purchase.

This part of the case comes within the rule laid down by Lord Ch. King, *Keech* v. *Sanford*, 3 Eq. Ca. Abr. 741, where a trustee applied to a lessor for a renewal of a lease, for the benefit of his *cestui que trust*, an infant, which the lessor refused to give. The trustee then took a lease to himself, and it was decreed that the lease should be assigned by him to the infant. The Chancellor said he must consider it a trust for the infant, "for, if the trustee, on refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestuis que trust;* and, though it might seem hard that the trustee was the only person of all *mankind who might not have the [*300 lease, yet it was very proper that the rule should be strictly pursued, and not in the least relaxed; for it was very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to *cestuis que trust.*

When John E. applied to Wendell to raise the money, and purchase the shares of the co-heirs, he refused, although promised a liberal compensation for his services, until he had secured to himself, by the agreement, an equal interest in the purchase. I will not say he was wrong in refusing, or that his duties as trustee required a compliance with the request, although, judging of things as they then appeared, it would be the means of making an advantageous sale of the trust property at Erie, and of adding something to the trust estate, by by way of profits on the shares to be purchased. If the proposition, instead of coming from himself, had been made to him by the *cestui que trust*, he should have declined it. What he had refused to do as trustee, in a matter so closely connected with the trust, he should not have done for his own benefit. It may, as observed by Lord Ch. King, seem hard that he should be the only person of all mankind who should be excluded from making such an agreement with the *cestui que trust*, but public policy requires it. The object of the rule is to secure fidelity on the part of the trustee, by taking from him every possible motive to act otherwise than for the interest of his *cestui que trust.* He had it in his power to defeat the speculation; and, as things have turned out, it would have been

well had it never taken place. The money to make the purchase could not be raised by the *cestui que trust*, without his consent; and to permit a trustee, under such circumstances, to impose his own terms, would be placing the *cestui que trust* entirely at his mercy. It is impossible to say what in-
[*301] fluence such *considerations may have had, in producing the agreement of March seventh.

He succeeded in purchasing the interest of one of the heirs, and took a deed to himself, as trustee. Wight did not come to make the purchase, but, a short time before the note at the bank was due, a Mr. Fross offered to purchase a third of the property, at $10,000. He informed Mrs. Schwarz and her husband of the offer, and advised them to accept it, and that the note at the bank was approaching maturity, and he wished to take it up. They objected, and said they would provide for the payment of the note. He then wished to sell his share, at any rate; and Mrs. Schwarz and her husband offer to purchase and pay him what would be his part of the profits, if it were sold. They propose to turn out a bond and mortgage against Joshua Boyer, in part payment, and to give their note for the balance; and Stewart was employed to draw an assignment of the bond and mortgage. He did so, and called on Mrs. Schwarz to execute it. She refused, saying they wanted the property for other purposes. She also said, defendant's account was too high. Defendant then requested Mrs. Schwarz to appoint another trustee, and to set off to him his share of the property. Mrs. Schwarz and her husband again offered to purchase his interest, on the terms they had before proposed, except as to the mode of payment. Mr. Hastings was appointed to succeed the defendant in the trust. The papers, including the note for $3,980.24, were made out and executed by the respective parties. After they were executed, Mrs. Schwarz said she thought Mr. Wendell might have waited for his share until the property was sold. This is a brief outline of the case.

Defendant was the first to propose that he should share in the profits of the purchase; and this after he had refused
[*302] *to raise the money and make the purchase as trustee.

When Fross offered to purchase a third of the property, he proposed to sell him a third that had been purchased, in which he had an interest, and not the third belonging to the *cestui que trust*, although it was with a view of selling this last, that the purchase had been made. When he gave as a reason for selling it separately, the payment of the note at the bank, they offered to provide for its payment from other sources; and it was not until he insisted on selling his share, that they proposed to purchase it. And after Mrs. Schwarz had refused to execute the assignment of the mortgage, and not before, he asked to be discharged from the trust, and to have his share set off to him. We do not see the *cestui que trust* volunteering, and urging on the trustee, in one important step taken by the parties; on the contrary, they appear, for the most part, to have originated with the trustee, and to have been taken by the *cestui que trust* with more or less reluctance. In *Morse* v. *Royall*, Lord Erskine noticed particularly that the trustee was not the first to propose a sale, but that the *cestui que trust* was determined to sell, and urged the trustee to purchase.

The money was obtained on Mrs. Schwarz's note, endorsed by Wendell. It should, I think, be considered a part of the trust fund, because it was obtained on the note of the *cestui que trust*, which the trust fund might have been called on to pay. Had it afterwards been paid by Wendell, out of his own funds, it would have been a good charge against the trust estate. Defendant says in his answer, Mrs. Schwarz signed it to save him the necessity of procuring an endorser. She should, then, have endorsed it, and not signed it as drawer. The contract states it to have been the note of Catharine Schwarz, endorsed by Wendell, and speaks of Wendell's interest in the *profits of the purchase to be made. Defendant [*303] cannot be allowed, by his answer, to explain away the terms of the written contract, and to say it is different from what it purports on its face to be. No money was advanced by him, and none was intended to be. He expected to pay the note, at maturity, with the money to be received from Wight, on the sale to him. The land was conveyed to him as trustee, and,

by the written contract, he stipulated for a share in the profits of that part of it, only, which there was, at the time, a prospect of selling to great advantage.

The contract of March 7th, for these reasons, was not binding in equity on Mrs. Schwartz, the *cestui que trust;* and I cannot consider anything done by her subsequently as a free and voluntary confirmation of it, with a knowledge of her rights. She appears to have been under the impression that she was bound by it, and to have acted accordingly.

If I could come to the conclusion that defendant was entitled to half the purchase, I should still doubt whether the sale of it to Mrs. Schwarz, under the circumstances, and for the reasons stated, should not be set aside. I think it should be. There is nothing in the settlement of accounts, when the trust was transferred to Hastings, to prevent it. The settlement was no waiver of her rights, unless she acted at the time with a full knowledge of what her rights were, and with an intention of waiving them. Nothing of the kind appears, but the contrary is clearly to be inferred. She stated at the time, that she thought Mr. Wendell might have waited for his share until the property was sold.

The same observations would apply to the covenant set up in the plea, if it extended to, or reached the case made by the bill.

[*304] *As to the part Mr. Schwarz took in the business, and the supposed guarantee it afforded against the trustee's taking any advantage of the position in which he stood to the *cestui que trust*, I think it should have no bearing on the case. It was the duty of the trustee to consult and advise with the *cestui que trust*, and not Mr. Schwarz. The very object of a trust for a married woman would, in many cases, be defeated, if the wishes and inclinations of the husband were to be consulted, instead of the interest of the *cestui que trust*. It would be as well, at once, to place the property of the wife at the disposition of her husband.

The complainants filed their bill within three years and a half after the note was given, and within six months after it

became due. I do not think the delay unreasonable, or a good ground for refusing relief. The note has not been paid, and the bill was filed soon after it became due, and complainants were called on to pay it.

No charge was made by the trustee for his services, when the trust account was settled. He was, as he stated in his answer, induced not to charge for his services, in consequence of the handsome sum he expected to realize from the sale of the Erie property to the *cestui que trust*. He was entitled to a reasonable compensation for his time and services as trustee. *Ringgold* v. *Ringgold*, 1 Harr. & Gill, 11, 83.

A decree must, therefore, be entered, setting aside the settlement of January 28th, 1837; and there must be a reference to a Master to take and state an account of all moneys received by defendant, as trustee. In taking the account, the Master must charge defendant with the amount of the note of January 28th, 1837, for $3,980.24, with six per cent. interest up to the time it became due, and seven per cent. interest from that time to the taking *of the account, unless the defendant [*305] shall cause the note to be cancelled, or surrendered, at or before that time.

And he must allow defendant a reasonable compensation for his time and services as trustee, with interest from the termination of the trust. The question of costs is reserved until the coming in of the Master's report.

NOTE. This case was appealed to the Supreme Court, but was finally settled, without any further proceedings.

John H. Bailey and George B. Storm *v.* Seba Murphy, Margaret Murphy, Dan B. Miller, and John J. De Graff.

Under the statute regulating the terms on which non-resident defendants, in mortgage cases, are permitted to appear and defend, two things only are required of the defendant, viz: his appearance before the mortgaged premises are sold on the decree, and the payment of such costs as the Court shall award. The costs only are left discretionary with the Court, and, on the payment of them, defendant has a right to interpose a defense.

The statute extends to all defendants who are non-residents, and makes no distinction between mortgagors and subsequent incumbrancers.

Petition by a non-resident defendant for leave to come in and defend a mortgage foreclosure.

The bill in this case was filed to foreclose a mortgage given by Murphy and wife. A decree had been entered, and the premises were advertised to be sold by a Master. John J. DeGraff, a non-resident defendant, presented a petition to be let in to defend.

The petition stated that defendant was, and had been for several years, a resident of the city of Schenectady, in the State of New York, and that he had never resided in the State of
[*306] Michigan. That he had not been served *with process, and had no notice of the suit until within the last few days, when he was informed such suit was pending, and that he was a party defendant. That he was the *bona fide* owner and holder of a second mortgage upon the premises, executed by Murphy and wife, December 17th, 1839, for $1,100, and interest. That he had made a full statement of all the facts and circumstances in relation to said mortgage, so far as they had come to his knowledge, to his counsel, who advised him he had a good defense to his suit, and the first mortgage to be foreclosed thereby.

T. Romeyn, for petitioner.

A. D. Fraser, contra.

The Chancellor. Where a bill is filed to foreclose a mortgage, against a non-resident defendant, who fails to appear within the time allowed by the order for his appearance, the statute provides that if he, at any time before the sale of the mortgaged premises, shall appear, and pay to the complainant such costs as the Court shall award, the Court shall stay the sale, and the same proceedings shall be thereafter had, as if the defendant had been served with process, and had regularly appeared. R. S., 373, § 89.

To avail himself of the statute, two things only are required of the defendant, viz: his appearance before the mortgaged premises are sold, on the decree, and the payment of such costs as the Court shall award. The costs only, are left discretionary with the Court, and, on the payment of them, defendant has a right to interpose a defense. The Court will guard against the abuse of this right by defendants, by the power it has to award costs. The statute extends to all defendants. It is not limited *to the mortgagor. It makes no distinction [*307] between the mortgagor and a subsequent incumbrancer, and the Court will make none.

Motion granted.

George F. Bragg *v.* Leverett Whitcomb and Horace V. Whitcomb.

Where a defendant both answers and demurs to different parts of the bill, and the demurrer is overruled, complainant, to obtain a further answer, must except, under the thirty-fourth rule of the Court, to the answer already put in by defendant, within twenty days after the demurrer is overruled.

This was a motion to set aside an order taking the bill as confessed.

Defendants had severally answered to a part, and demurred to a part of the bill; and, at the last term, the demurrers were

overruled without argument, when the following order was entered:

"The *demurrer* filed in this cause to the bill of complaint coming on to be heard, and having been duly argued by counsel for respective parties, it is now here ordered by the Court, that said *demurrer* be, and the same is hereby overruled with costs to the plaintiff, with leave to the defendants to answer, and serve a copy upon complainant in forty days, on payment of the costs to be taxed."

Neither of the defendants having put in a further answer within the forty days, an order was entered taking the bill as confessed against both defendants, which it was moved to set aside.

J. F. Joy, in support of the motion.

E. C. Seaman, contra.

[*308] *The Chancellor. The complainant, if he wished a further answer from either of the defendants, after the demurrers were overruled, should have excepted to the answer already put in by such defendant, within twenty days after the demurrer was overruled, under the thirty-fourth rule of the Court. The thirty-third rule is applicable to that class of cases only, where the plea or demurrer, or pleas or demurrers, (for there may be several pleas or demurrers to different parts of the bill,) extend to the whole of the bill; and not where the defendant both answers and pleads, or answers and demurs, and the plea or demurrer is overruled. *Kuypers* v. *The Reformed Dutch Church*, 6 Paige R. 570.

The order overruling the demurrers should have used the word *demurrers* instead of *demurrer*, as each of the defendants had put in a separate demurrer; and it should not have required the defendants to answer, and serve a copy of their answer, in forty days. The order should have been that the *demurrers* be overruled with costs, and nothing more. To correct the error in drawing up the former order, let an order be now entered, overruling the *demurrers*, with costs, and setting aside the order taking the bill as confessed.

*Sarah H. Johnson *v.* Abner Johnson. [*309]

Where a petition was not signed by the petitioner, but was verified by an affidavit signed by her, which stated that she had read it, and knew the contents of it, and that it was true, it was held to be a sufficient signature of such petition.

Where the subpœna was served on the keeper of the State's prison, instead of on the defendant, who was confined therein, the service was held sufficient.

When any party wishes to set aside the proceedings of his adversary for a mere technical irregularity, he must make his application at the first opportunity; and a defendant who has not caused his appearance to be entered, is entitled to no more indulgence than one who has appeared.

After a motion has been denied on its merits, it should not be renewed, without leave of the Court, on the same facts, or any new facts which might have been included in the first motion. The party must present all of his case at once, whether he have several grounds or not.

Sentence to hard labor in any prison, jail, or house of correction, for three or more years, is a good ground of divorce under the statute.

Upon the dissolution of a marriage by divorce, or sentence of nullity, for any cause excepting adultery of the wife, she is entitled to the immediate possession of all her real estate, in the same manner as if her husband were dead.[1]

This was a motion by defendant to set aside a decree of divorce.

H. H. Emmons, in support of the motion.

G. C. Bates, contra.

The Chancellor. A petition was filed in this Court, August 4th, 1841, by Sarah H. Johnson, for a divorce from her husband, Abner Johnson, and a decree was entered, according to the prayer of the petition, on the 4th day of October following. The defendant had been convicted of aiding and assisting in counterfeiting the coin of *the United States. [*310

[1] See Comp. Laws., 1871, §§ 4750, 4751.

and sentenced to imprisonment in the State penitentiary, at hard labor, for the term of six years. On that account the divorce was granted. On the 19th day of July, 1842, he was pardoned by the President of the United States; and he, soon after, made a motion, by his solicitor, to have the decree set aside for *irregularity*. The motion was then denied. It is now renewed, but not on precisely the same grounds, as defendant has submitted to the Court an answer, which he wishes to put in to the petition. The present motion, therefore, is made upon two grounds,—the irregularity of the proceedings under the petition, and the merits, if any, set up by the proposed answer.

The former motion rested entirely upon the following irregularities: *First*, that the petition was not signed by the petitioner; *Secondly*, that the subpœna was not served upon the defendant personally, but was left with the keeper of the prison; *Thirdly*, that the order taking the petition as confessed, was entered two days before the forty days defendant had to answer in, after the return day of the subpœna, had expired; *Fourthly*, that the order for a reference to a Master to take proof of the facts charged in the petition, and to report such proof with his opinion thereon, was entered with the register as a common order.

The petition was not signed by the petitioner, but it was verified by her affidavit at the foot of the petition, which affidavit was signed by her, and in which she stated she had read the petition, knew the contents thereof, and that it was true. This was a sufficient signing of the petition, or recognition of it as her own act, to answer the requirement of the statute. *Willard* v. *Willard*, 4 Mass. R. 606.

The service of the subpœna was well enough. *Joyce* v. *Joyce*, 1 Hogan R. 121. When the defendant is absent, [*311] *the subpœna may be served on his wife, or servant, or some member of his family, at his dwelling house, or place of abode. Rule 16. It could not be served on the defendant personally, nor could it be served on his wife, she being the petitioner. Service on the keeper of the prison,

under the circumstances, was the only service that could be made.

The order taking the petition as confessed, was prematurely entered. Nor was the one hundred and first rule of the Court literally complied with, in obtaining the order of reference to take proofs. The rule says, if any such bill (which must be construed to include petition, when the party proceeds by petition,) is taken as confessed, or the facts charged therein are admitted by the answer, the complainant may apply to the Court, on any regular motion day, or in term, upon due proof of the irregularity of the proceedings to take the bill as confessed, or upon the bill and answer, for a reference, &c. The almost invariable practice under this rule, where there is no appearance for defendant, so far as my experience goes, is, to enter the order with the register as a common order, as in mortgage cases, against absent defendants and minors, under the ninety-sixth rule. I see no objection to this practice, as the order would in all cases, upon a special application to the Court, be granted of course; and, after the proofs are taken, the whole case is examined by the Court on the final hearing.

These last two objections are purely technical; they in no way affect the merits. They are a departure from the rules established by the Court, to regulate its proceedings, and nothing more; and, when either party wishes to set aside the proceedings of his adversary, for a mere technical irregularity, he must make his application at the first opportunity. He must not lie by, and permit his *adversary to take step after [*312] step in the cause, without so much as notifying him of his error, for the purpose of afterwards having his proceedings set aside. *Hart* v. *Small*, 4 Paige R. 288; *Nichols* v. *Nichols*, 10 Wend. R. 560. And a defendant who has not caused his appearance to be entered, is entitled to no greater indulgence, in this respect, than one who has appeared. *Brown* v. *Childs*, 17 J. R. 1; *Downs* v. *Witherington*, 2 Taunt. R. 242. There is no reason why a defendant, who has been duly served with process, and who has abandoned all defense, by neglecting to appear in the case, after a decree has been rendered against him, should

have it set aside for a mere technical irregularity, which would, probably, not have occurred, had he appeared. More especially in a case like the present, where the petitioner has married since the entry of the decree. She was divorced on the 4th day of October, 1841, and married July 8th, 1842; and the former motion was not made until the 26th day of October following. Such were my reasons for denying the first motion, and, on reviewing them, I am satisfied with the decision then made.

After a motion has been denied on its merits, it should not be renewed without leave of the Court, on the same facts, or any new facts which might have been included in the first motion. The party must present the whole of his case at once, and not in detached parts; and if he have several grounds for his motion, he must bring them all before the Court at the same time, and not make each one the subject of a distinct motion.

Sentence to hard labor in any prison, jail, or house of correction, for three or more years, is a good ground of divorce under the statute. Defendant does not, therefore, deny petitioner's right to a divorce; but asks to have the decree [*313] opened, for the purpose of reviewing the *allowance made for her support out of his estate. It appears from the proposed answer, that James Johnson held 584 acres of land in trust for defendant, at the time of his conviction; 171 acres of which are now held by petitioner, worth about $1,000. After his conviction, the 584 acres of land were conveyed by James Johnson and defendant, and two other tracts, the quantity of which is not stated, by defendant and petitioner, to Jacob M. Howard, to pay for his professional services, and to pay a fine of $1,500, which was part of defendant's sentence, in case it was not remitted; after which Howard was to re-convey the balance of the land to James Johnson. Twelve days after these conveyances to Howard, he conveyed 171 acres to petitioner, for her support, and that of a child six years of age. This conveyance is set forth in her petition; and the decree, instead of giving these lands to her, as defendant's counsel seems

to suppose, only directs that, for the support of herself and child, she shall have, hold, and enjoy, all the products and rents of the land so conveyed to her. In other words, the decree gives her what the law would have given her, had no mention whatever been made of the land, in drawing up the decree. Upon the dissolution of a marriage by divorce, or sentence of nullity for any cause excepting adultery of the wife, she is entitled to the immediate possession of all her real estate, in the same manner as if her husband were dead. R. S. 339, § 22. The decree, therefore, in this particular, is only declaratory of the statute. The land had been conveyed to her by Howard, and in law belonged to her, and, by the divorce, defendant ceased to have any interest in it. The answer would seem to set up a breach of trust in Howard, in conveying to petitioner. That matter however, cannot be tried in this suit; and there are strong reasons for supposing the conveyance was made with the *assent of all parties. Defendant does not deny [*314
it was with his assent, or state that it was contrary to his wishes.

Motion denied.

Ebenezer Westbrook *v.* Alfred Comstock, Harriet Comstock, Euphemia Westbrook, Henrietta M. Westbrook *et al.*

Where money was directed to be paid into Court, under a decree, for an infant, and her guardian accepted a deed of lands in lieu thereof, *it was held*, that it was not binding on the infant; and that the guardian had no right to receive the money, much less land in lieu of it.[1]

This Court has general supervisory power over the persons and estates of infants;[2] and, when any part of an infant's estate is in litigation here, it is under the immediate guardianship and protection of the Court; and, where money belonging to an infant is ordered to be paid to the register,

[1] See Livingston *v.* Jones, Harr. Ch. 165.

[2] See Bond *v.* Lockwood, 33 Ill., 212.

neither the guardian *ad litem* nor general guardian of the infant has any right to receive it.

Before this Court will order money to be paid to a guardian, it must be satisfied that he has given sufficient security for the performance of his trust, and that he has not abused it.

A legacy left to a married woman is liable to an attachment issued against her husband; but the attaching creditor must take it subject to her equity, which is to have the whole, or so much as the Court may see fit, set apart to her for her support.[1]

This was a hearing on exceptions to a Master's report.

H. H. Emmons, in support of the exceptions.

E. B. Harrington, contra.

The Chancellor. The Master reports that Euphemia and her husband have been paid what was going to her un-
[*315] der the decree; that the settlement made by *complainant with Henrietta and her guardian should not be treated as a payment of her share; and that he is of opinion that no debt is due from Alfred Comstock, the husband of Harriet, to John H. Westbrook, the attaching creditor; and, admitting an indebtedness, to preserve the wife's equity, her share, should be paid into Court, as directed by the decree, with leave to the attaching creditor to apply to the Court, to have what is not settled on her applied towards paying his judgment, should he succeed in obtaining one.

[1] See Ewell's Lead. Cases on Infancy and Coverture, 387, 388, 472, *et seq.*

By the passage of the act of 1855, (Sess. Laws, 420; Comp. Laws, 1871, § 4,803) married women acquired the same power over their property, in all respects, as if unmarried. See People *v.* Horton, 4 Mich., 67; Durfee *v.* McClurg, 6 id., 223; Starkweather *v.* Smith, id., 377; Watson *v.* Thurber, 11 id., 457. See further as to the power of married women over their property and their power to contract concerning the same, &c., since the passage of said act, Penniman *v.* Perce, 9 Mich., 509; Wales *v.* Newbould, id., 45; White *v.* Zane, 10 id., 333; Tillman *v.* Shacheleton, 15 id., 447; Stiles *v.* Stiles, 14 Mich., 72; Glenn *v.* Alcott, 11 id., 470; Berger *v.* Jacobs, 21 id., 215; Campbell *v.* White, 22 id., 178; West *v.* Larraway, 28 id., 464; Amery *v.* Lord, 26 id., 431; De Vries *v.* Conklin, 22 id., 255; Rankin *v.* West, 25 id., 195.

The settlement with Henrietta, by giving her a deed or mortgage, it does not clearly appear which, of lands of much less value than her share, and the subsequent confirmation of it by her general guardian, are acts not binding on her, and should in no respect affect her rights under the decree. There are strong badges of fraud attending the settlement. But, aside from this, the guardian had no right to receive the money, which was directed by the decree to be paid into Court, much less take land in lieu of it. This Court has the persons and estates of infants under its special care and protection; and it is sometimes called their general guardian, from its general superintendence over their persons and estates. It may appoint a guardian for an infant who has no guardian, and it may, for good cause, remove a testamentary guardian, or one appointed by a judge of probate. Every guardian, however appointed, is responsible here for his conduct, and may be removed for misbehavior. 1 J. C. R. 99; 2 J. C. R. 439; 2 Paige R. 374; *Wood* v. *Wood*, 5 Paige R. 596. It follows, from this general supervisory power of the Court, that when any part of an infant's estate is in litigation here, it is under the immediate guardianship and protection of the Court; and consequently, that, where money belonging to an infant is ordered to be paid to the *register, neither the guardian *ad litem*, [*316] nor general guardian of the infant, has any right to receive it. Before the Court will order it to be paid to the general guardian, it must be satisfied he has given sufficient security for the performance of his trust, and that he has not abused that trust. Especially in a case like the present, where he had not applied to the Court to be admitted to defend the suit, and another had been appointed for that purpose.

Harriet's share was liable to the attachment issued against Alfred Comstock, her husband, but the attaching creditor must take it subject to the wife's equity, which attaches to the fund, it being a legacy. This equity is a right to have the whole, or such part of the fund as the Court may think proper in the exercise of a sound discretion, set apart to her for her support.

Kenney v. *Udall*, 5 J. C. R. 464; *Van Epps* v. *Van Deusen*, 4 Paige R. 64. After this has been done, the balance, if any, will belong to the attaching creditor, should he succeed in obtaining judgment in the attachment suit, and he may present his petition to have it paid to him on his judgment. To permit complainant to pay the money to the attaching creditor, would be to deprive the wife of her equity, or make it necessary for her to file a bill to prevent its passing into his hands discharged of her equity. The decree requires the money to be paid into Court by complainant, and if, in consequence of the attachment, either he or Harriet must file a bill to protect his or her rights, it is better he should do it to protect himself, than that she should do so, to preserve her equity. If the attaching creditor, after he has obtained judgment, instead of presenting his petition here, should persist in proceeding at law, this Court will restrain him by injunction at the suit of complainant. I hardly think that, however, will be necessary.

It is very questionable whether he can recover a judg-
[*317] ment against *Comstock; whether Comstock is, in fact, owing him anything. I am inclined, from the evidence, to believe the attachment suit was got up by complainant himself, for the purpose of embarrassing, if not preventing, a sale of his land, by reason of his default to pay the money as required by the decree.

There is no exception to the report in regard to Euphemia's share.

The exceptions must be overruled, and the Master's report confirmed.

The Albany City Bank *v.* Josiah R. Dorr.

A plea must rest the defense upon a single point; and a plea containing two distinct points, is bad.[1]

The return of an execution unsatisfied, is conclusive between the parties to a judgment creditor's bill, when the return is good on its face, and has not been made by collusion between the creditor and officer, or by direction of the creditor.

An execution creditor is not bound to point out property to be levied on: he has done all that the law requires of him, when he has placed his execution in the hands of the sheriff, whose duty it is to make the money.

Hearing on plea to judgment creditor's bill and motion for receiver.

The plea stated that at the commencement of the suit at law, the rendition of the judgment, the issuing and return of the execution, and on putting in his plea, defendant was seized and possessed, in his own right, in fee simple, of certain tracts or parcels of land, describing them, situate in Wayne county, where the judgment was obtained; and also of certain other tracts or parcels of land *in the State, describing [*318 them by their section, township and range, but not by the county in which they were located. It then averred the whole of said land was free from incumbrance, and of greater value than the amount of the judgment; that, after the suit at law was commenced, defendant called on plaintiff's attorneys, who were the solicitors in the present suit, and placed before them his title deeds to all of the aforesaid land, except that part of it which was in Wayne county, and offered to turn out a sufficient quantity of it to pay the debt, and costs that had been made, to be selected by said attorneys, at a stated valuation; and informed them he should continue to hold it, and that it would, at all times, be subject to any execution that might be issued on the judgment to be obtained against him, and that he would, at any time, turn it out to be levied upon. It also

[1] See Carroll *v.* Potter, *post*, 355.

stated, that when the execution was placed in the sheriff's hands, when it was to be returned, and during the intervening period, the said attorneys were aware defendant held said real estate, and was ready to turn it out to be levied upon; that they did not give the sheriff directions to levy on the land in Wayne county; that defendant was not called on to pay the execution by the sheriff, or to turn out property to be levied upon; that defendant was ignorant of the issuing of the execution until the bill was filed, and that no *alias*, or *pluries* execution, had been issued into the other counties, in which a part of the real estate is situated.

Barstow & Lockwood, in support of the motion and against the plea.

I. The bill in this case is an ordinary creditor's bill, upon which an injunction has been obtained, and is now in force against the defendant. On such a bill, a receiver will be [*319] granted as, of course, if the equity of the bill is *not denied. 4 Paige R. 575; 2 Id. 342; 7 Id. 58; 2 Hoff. Ch. Pr. 126.

A plea having been put in in this case, all the material facts in the bill are admitted; and a receiver will be granted unless the plea is well pleaded, and good in substance, and constitutes a a true and good defense to the action. For, if the plea is such an one as would be overruled on an argument as to its sufficiency, it is a bad plea, and the defendant can gain nothing by it. 4 Paige R. 178.

II. The plea in this case is multifarious. Various facts cannot be pleaded in one plea unless they tend to a single point, and a plea containing more than one distinct point, is bad for multifariousness. Story Eq. Pl. 496, 497, 504; 2 Ves. & B. R. 153; 3 J. C. R. 388; 6 Ves. R. 17; 7 J. C. R. 214; 15 Ves. R. 377; 1 Edw. R. 66.

This plea sets up two distinct matters, viz: *First*, that defendant has lands in Wayne county, known to the plaintiff's attorneys, and alleges that, although execution has issued into that county, they did not point out the lands to the sheriff; and

that the sheriff did not call upon the defendant; and, *Secondly*, it undertakes to set up that the defendant had and has other lands (where situated it is not said,) known to the plaintiff's attorneys, in the State of Michigan, and alleges that no execution has issued to any county except Wayne.

These defenses are not only distinct, but inconsistent; for, if defendant had sufficient lands in Wayne county, and the sheriff neglected his duty, and the plaintiff was not responsible for such neglect, he certainly was not guilty of bad faith in not issuing execution into another county.

III. Though these different grounds of defense set forth in the plea render it multifarious, neither of them constitutes a good defense to the equity of the bill.

1. The misconduct of the sheriff in not calling upon the *defendant, cannot be set up as a defense to this [*320] action; the party must look to the sheriff. 7 Paige R. 56; 2 id. 419.

2. The sheriff's return is conclusive, in this suit, as to the facts contained in it, and it is not competent for the defendant to set up facts contradicting it, to wit, that defendant had lands in the county. The proper remedy is by application to set aside return. 2 Paige R. 419; Cow. & H. notes to Ph. Ev. 1087; 17 Mass. R. 601; 10 Pick. R. 169; 11 Mass. R. 313.

3. An attorney, or plaintiff, is not obliged to point out property for the sheriff to levy upon. He does his duty by delivering the execution to the officer, who is bound to find property, if there be any, at his peril.

4. The plea must be certain, and aver facts explicitly, not leaving them to be inferred by argument. Story Eq. Pl. 596. There is no allegation in the plea, from which it can be gathered, except by distant implication, that defendant had lands in any county but Wayne.

5. If there is sufficient averment that certain lots of land set forth in the plea, were out of the county of Wayne, it should also set forth that they were of sufficient value to pay the debt; thus showing a perfect legal remedy, if executions had been issued to other counties.

IV. An execution was issued into Wayne county where judgment was obtained, and where defendant resides, in which it is most probable that he would have property, and the plea alleges that he has. This, we insist, is sufficient. 6 Paige R. 273; 8 id. 130; 7 id. 85, 149.

1. There is no case to be found, deciding that more than one execution must issue, except where defendants are numerous, and reside in different counties.

2. There are no other defenses on the ground of want of [*321] a *bona fide* attempt to collect the debt at law, *enumerated, than the following: *First*, collusion with the sheriff; and, *Second*, issuing execution into a remote county, when complainant is aware that defendant had property in the county where he resided, within the jurisdiction of the Court; in which case it is necessary, not only for a party to show that he resided, but also had visible property there. Both these things must be shown, neither of itself constituting a defense. 3 Paige R. 312; 8 id. 130.

3. If the defense is good, the remedy in this Court, by bill, is a mere nullity. But one execution can be issued at a time, and if the defendant, (as might well be,) should have lands in several counties, and sufficient in no one of them to satisfy the debt, it might be several years before all the executions could be returned. And to support a creditor's bill, the execution cannot be returned before the return day.

4. All that is required, is a *bona fide* attempt, and if, after the return of an execution and before the filing of a bill, defendant acquires property in the same county, and notifies complainant, it will be no defense. And the issue of a second execution not yet returned, is no bar. 7 Paige R. 149; 6 id. 273.

It is not necessary that every legal remedy should be exhausted, to maintain a creditor's bill. The statute makes the return of *fi. fa.* the ground of jurisdiction; and, under the equity of the statute, the Court simply require that the execution should have been issued in good faith. 7 Paige R. 448, 149; 2 Hoff. Ch. Pr. 117.

Joy & Porter, in support of the plea.

I. This is a good plea. It proves that the remedy at law was not exhausted; and it must be exhausted fairly and *bona fide* before this bill can be sustained. 3 Paige *R. 311; [*322] 2 Hoff. Pr. 118; *Freeman* v. *Michigan State Bank*, *ante* 62.

The case of *Child* v. *Brace*, 4 Paige R. 315, clearly shows that where there is known property of the defendant in any county, into which process may run, or if the defendant is willing to turn out property in any such county, the execution must be sent there, or the remedy is not exhausted, and the bill must not be filed. See 7 Paige R. 664; *Stafford* v. *Hulbert*, Harr. Ch. R. 435. In this case the plea shows that the attorneys had sufficient notice of the existence of property which they might have caused to be levied upon.

II. The silence of the attorneys operates as a fraud on the defendant. They were bound in good faith to inform the sheriff, of the existence of property.

The Chancellor. The objection to the plea for multifariousness is well taken. It sets up two distinct points; *First*, that the execution was improperly returned unsatisfied; and, *Second*, that, as defendant was the owner of real estate out of the county of Wayne, and had informed complainant's solicitors of that fact, at, or about, the time the action was commenced at law, complainant should have taken out an *alias* execution, directed to the sheriff of the county in which such real estate is situated. Either of these positions, if well taken, would be a good defense to the bill; and the evidence that would establish one, would not establish the other. They are as different from each other as two separate pleas. The first denies a proper return of the execution; the other, conceding that point, insists that an *alias* execution should have been issued. A plea must rest the defense upon a single point, and a plea containing two distinct points is bad. *Goodrich* v. *Pendleton*, 3 J. C. R. 384. The plea must, therefore, be overruled.

*But, as there is a motion for a receiver, it is nec- [*323]

essary, in order to dispose of that question, to decide whether either of the grounds taken by defendant would be a good defense, if properly pleaded.

To show that the execution was improperly returned unsatisfied, the plea states the following facts: 1st. That defendant now is, and that he was, when first sued at law, and from that time to the present has been, the owner of unincumbered real estate, situate in the county of Wayne, and other parts of the State, sufficient in value to pay the judgment. 2d. That after he had been sued at law, he called on plaintiff's attorneys, who are solicitors in the present suit, and placed before them his title deeds to all of said real estate, except that part of it situated in Wayne county, and offered to turn out a sufficient quantity of it, to be selected by said attorneys, to pay the debt and costs, at a stated valuation, and informed them that he should continue to hold it, and that it would, at all times, be subject to any execution that might be issued on the judgment to be rendered in said suit, and that he would, at any time, turn it out to be levied upon. 3d. That plaintiff's attorneys were aware he had such real estate, both when the execution was issued, and when it was returned, and that they did not give the sheriff directions to levy on it. 4th. That defendant was not called on by the sheriff to pay the execution, or to turn out property on it; and that he was uninformed of the issuing of the execution, until the bill was filed.

These facts, conjointly, do not form a good defense to the bill. They show that the officer, in neglecting to call on defendant with the execution, did not do his duty; but they show nothing more. Complainant was not bound to go with the officer to defendant, or to point out property to be levied upon. [*324] He did all the law required of him, when *he placed his execution in the hands of the sheriff, whose duty it was to make the money. If the sheriff has not done his duty, and defendant is injured, he must look to the officer for redress. The negligence of the sheriff is no defense. The return to an execution is conclusive between the parties, when good upon its face, unless it has been made by collusion between the creditor

and officer, or by the direction of the former. There would be no end to litigation in this class of cases, if this Court would go behind the officer's return. It might, with as much propriety, go behind the judgment itself, and allow what had been adjudged at law to be litigated anew here, as to inquire into the regularity of the proceedings at law. In no case has this Court gone that length. If the officer improperly returned the execution unsatisfied, defendant should have applied to the Circuit Court, and had it set aside. *Stores* v. *Kelsey*, 2 Paige R. 418; *McElwain* v. *Willis*, 9 Wend. R. 560, per Nelson J.; *Sanford* v. *Sinclair*, 8 Paige R. 373; *Shottenkirk* v. *Wheeler*, 3 J. C. R. 275.

All that the statute requires to give this Court jurisdiction, is a return of the execution unsatisfied, in whole or in part. In *Smith* v. *Thompson*, *ante* 1, the execution was returned before the return day. On that account it was held to be bad, as the defendant, after the return of the execution, and within its lifetime, might have had property to satisfy it. The return in that case was bad upon its face. In *Williams* v. *Hubbard*, *ante* 28, the execution was returned unsatisfied by direction of the plaintiff, as appeared by the return. The return was held insufficient, because it was not made on the responsibility of the officer, but by the direction of the plaintiff, who had a right to have his execution returned in that way, if he chose; and because the officer could not, in such a case, be sued for a false return. In *Wharton* v. *Fitch*, *ante* 143, the *plaintiff's attorney instructed the sheriff not to levy on [*325] land, and the officer returned the execution unsatisfied, although the defendant offered to turn out land to be levied on, when the sheriff called on him with the execution. Here was a collusion, or at least an understanding between the plaintiff's attorney and the officer, not to make the money out of real estate. Nothing of this kind is set up by the defendant in his plea. There is no pretense that the officer was instructed not to levy on real estate, or to return the execution without searching for property to satisfy it, or calling on defendant to pay it. But defendant seeks to raise an equity in his favor out of the

offer made by him, soon after he was sued at law, to turn out real estate in payment of the debt; and out of what took place at that time between him and complainant's attorneys. This offer to pay the debt in land, at a stated valuation, did not change the rights of the parties, who then stood, and still stand, in the relation of debtor and creditor to each other. It imposed no legal or moral obligation on the creditor, to receive lands in payment of his debt; and, consequently, it cannot be the basis of a new equity or right between the parties. If defendant had tendered money instead of land, the case would have been different; and he might have taken the money into Court, and pleaded the tender in bar of the further prosecution of the action. While defendant insists that it was the complainant's duty to inform the officer defendant had lands within his bailiwick, and to point them out to be levied on, he seems to forget he was under a greater obligation to pay the judgment without waiting for an execution.

As to the *alias* execution, this case differs widely from *Freeman* v. *Michigan State Bank*, *ante* 62. In that case, within the lifetime of the execution, and while it was in the hands [*326] of the sheriff, the bank informed complainant it *had sufficient unincumbered real estate, in Saginaw and Lapeer counties, to pay the judgment, and offered to turn it out to be levied on and sold, if complainant would send an *alias* execution into either of those counties. The value of the property was alleged to be sufficient to pay the judgment. Here, the value of the property out of Wayne county is not stated. In that case, the Court said the complainant should have had his execution returned, and taken out an *alias*, directed to the sheriff of the proper county, and that the execution, for that purpose, might have been returned in vacation, without waiting for the return day. The *alias*, therefore, might have been made returnable on the day the first execution was returnable, and, if sufficient money had not been made on it to satisfy the judgment, the complainant might still have filed his bill when he did. He would have sustained no delay in the collection of his debt.

The value of the property should be stated. The defendant might have lands in a dozen different counties, the whole of which would not be more than sufficient to pay the debt. This Court would not, in such a case, require plaintiff, before filing a bill, to take out a dozen successive executions, which would take six years, allowing a term for each execution; and, by our existing laws, no two of the executions could be in the hands of different officers at the same time. Laws 1839, p. 24, § 6.

Plea overruled, and reference to a Master to appoint a receiver.

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*Nehemiah S. Burpee *v.* Ira Smith, Levi [*327] Trowbridge, John Van Tine, Jas. G. Horton, and Daniel Harding.

It is well settled that a Court of Chancery will relieve against a judgment at law, where complainant was prevented from making his defense at law by the fraudulent conduct of the defendant.[1]

Where a defendant demurs to discovery and relief, when he should have demurred to discovery only, his demurrer will be overruled.[2]

Where one of several defendants demurs to discovery on the ground that it would subject him to a criminal prosecution, his demurrer should be confined to such parts of the bill as tend to implicate him in the supposed crime.

Where complainant had signed a joint and several note with H. and was sued alone, and had judgment rendered against him on the note at law, *held*, that he need not make H. a party to a suit in this Court to restrain proceedings on the judgment at law.[3]

A magistrate before whom a judgment was rendered is not a proper party defendant to a suit brought in Chancery to restrain proceedings on it.

Courts of equity restrain proceedings at law, when necessary to the attainment of justice, not by assuming jurisdiction over the Courts in which the proceedings are pending, but by controlling the parties to such proceedings by injunction.

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[1] See Mack *v.* Doty, Harr. Ch., 366; Miller *v.* Morse, 23 Mich., 365.

[2] See Williams *v.* Hubbard, *ante*, 28.

[3] See Ingersoll *v.* Kirby, *ante*, 65 and note.

Where an officer has an execution in his hands, still in force, he is a necessary party to a bill which seeks to restrain proceedings upon the judgment on which it was issued.

This was a hearing on demurrer to a bill seeking relief against a judgment obtained before a justice of the peace.

Trowbridge, one of the defendants, obtained a judgment against complainant before a justice, on a joint and several note for $100, of complainant and one Hutchins, dated March 1st, 1838, and payable to Smith or order, six months after date. The bill stated that Smith charged Hutchins with feloniously taking his property, and that the note was given to settle [*328] the matter between them,— *complainant signing it as surety for Hutchins; and that, after it became due, Smith transferred it to Trowbridge, who sued it in his own name for Smith's benefit. The other facts stated in the bill, sufficiently appear in the opinion of the Court. All of the defendants except Harding, against whom the bill was taken as confessed, demurred to the discovery and relief.

H. T. Backus, in support of the demurrer.

A. H. Hanscom, contra.

The Chancellor. One ground of demurrer is, that complainant had a good defense at law, and should have availed himself of it before the justice. When the summons was served, he did not know Trowbridge was the holder of the note. Trowbridge held a note against him of about eleven dollars, a part of which had been paid some three or four weeks before, and complainant thought he was sued for the balance due on that note. He had never been called on to pay the Smith note by either Trowbridge or Smith; and the suit being against him alone, there was nothing in the summons to put him on his guard. To keep him in ignorance of the true character of the suit, as it would seem, Trowbridge sent a man to him on the evening of the day preceding the return of the summons, with a falsehood in his mouth, to inform him that judgment had on that day been obtained against him and that he need not be at

the trouble of attending court. Such are the statements of the bill; and, if true, as they must be taken to be for the purpose of disposing of the demurrer, they show complainant lost his defense, not by neglect, but through the unwarrantable, if not fraudulent conduct of Trowbridge, by which he was lulled into security. It is hardly necessary to say, that this Court will give relief in *such circumstances. Complainant [*329] did not learn judgment had been obtained on the Smith note, until it was too late to appeal.

Another ground of demurrer is, that the bill shows the note was given to compound a felony; and that equity will not compel a defendant to discover on oath a fact, which, if true, will subject him to a criminal prosecution. This objection can apply to Smith only; and he, to have availed himself of it in this way, should have demurred to the discovery only, and not to both discovery and relief; for although complainant may not be entitled to a discovery of the whole case from Smith, yet, he will be entitled to relief against him, if he can make out his case by other evidence. The demurrer should also have been limited to such parts of the bill as implicate Smith in the supposed crime. *Edwards* v. *Hulbert*, *ante* 54.

The next objection is that Hutchins is not a party. Complainant signed the note as surety for Hutchins. It is the several note of each as well as the joint note of both; and the judgment is against complainant only. I therefore see no reason for making Hutchins a party. If sued on the note, he can make his defense at law, and he may, or he may not choose to avail himself of it. This Court cannot control him in that respect. As Trowbridge sued complainant alone, he cannot object that Hutchins is not a party to the present suit; because he might have made him a party to the judgment, but did not.

The judgment was obtained before Horton, but that is no reason for making him a party. He could take no step in the cause before him, unless it was moved by one or other of the parties. It was not necessary, therefore, that he should be a party to insure an observance of the injunction. Courts of equity restrain proceedings at law, when necessary to the attain-

[*330] ment of justice, not by assuming *jurisdiction over the Court in which the proceedings are pending, but, by controlling the parties to such proceedings, by injunction.

Van Tine, the officer, stands on different ground. It is fairly to be inferred from the bill, although it is not in express terms alleged, that the execution was still in his hands, in full force, when the bill was filed. It was necessary to make him a party that the injunction might extend to him. *Fellows* v. *Fellows*, 4 J. C. R. 25.

Demurrer allowed, and bill dismissed, as to Horton, and overruled as to the other defendants.

[*331] *William T. Johnson *v.* Horace Johnson and John Prickett.

The vendee of an equity of redemption stands in the place of the mortgagor and holds the property subject to all incumbrances; and where there were two mortgages, and the mortgaged premises had been sold by foreclosure at law, on the first mortgage, on the payment of the redemption money by such vendee, and the assignment to him by the purchaser at the mortgage sale of all the interest of the latter in the land, *it was held*, that such vendee could not claim the rights of the purchaser at the sale, for the purpose of defeating the second mortgage.

When a subsequent mortgagee pays the redemption money of the mortgaged premises to the purchaser under the foreclosure of a prior mortgage, he does not succeed to the rights of such purchaser, but stands in the place of the prior mortgagee, the only additional right which he acquires being the right to be reimbursed what he has paid, with interest, on foreclosing his own mortgage.

When a mortgagor redeems, it should always be construed as a payment, he being personally liable for the debt. But when his vendee redeems, who is not personally liable, and there is an intervening mortgage between the one redeemed by him and his equity of redemption, the same rule should prevail as in case of a redemption by a subsequent mortgagee.[1]

This was a bill to foreclose a mortgage.

[1] See Webb *v.* Williams, *post*, 544.

The defendant, Horace Johnson, on the fourth day of February, 1837, mortgaged the premises to Daniel Windiate, and, on the 18th day of October following, he mortgaged them to complainant. On the 3d day of March, 1838, Windiate foreclosed his mortgage under the statute, and the two years' redemption expired March 3, 1840. (Laws 1833, p. 283.) May 23d, 1838, Horace Johnson sold the premises by quit claim deed to Alphonso B. Newcomb, and, after passing through the hands of several persons, they were purchased by Prickett of one Burgess, August 12, 1839, subject to Windiate's mortgage. Prickett, on the same day, paid Windiate, who was the purchaser at the mortgage sale, $790, the sum necessary to *redeem the premises, and took an assignment of all [*332] Windiate's right, title and interest as purchaser and mortgagee. The several deeds and mortgages were recorded, in the order in which they were executed.

J. B. Hunt, for complainant.

M. L. Drake, for defendant Prickett.

The Chancellor. Prickett insists that he holds the premises as assignee of Windiate's rights as purchaser under the mortgage sale, and not as purchaser of the equity of redemption from Burgess. If this view of the case be correct, then, the mortgaged premises not having been redeemed within the two years allowed by the statute, complainant's equity of redemption, as subsequent mortgagee, is barred. The statute is explicit on this point. It declares the conveyance to the purchaser, when the premises have not been redeemed, shall be an entire bar of all claim or equity of redemption of the mortgagor, his heirs and representatives, and of all persons claiming under him or them, by virtue of any title subsequent to such mortgage. Sec. 16.

With regard to redemption, the eleventh section says: "It shall be lawful for the mortgagor, his heirs, executors, administrators, or *assigns*, whose lands or tenements shall be sold in

conformity with the provisions of this act, within two years from and after such sale, to redeem such lands or tenements, by paying to the purchaser or purchasers, his or their executors, administrators or assigns, or to the proper sheriff, under sheriff, or deputy sheriff, the sum of money which may have been paid by such purchaser or purchasers, together with interest on such purchase money, at the rate of ten per centum per annum, from the time of such sale; and such payment being [*333] made *as aforesaid, the said sale, and the certificate granted thereon as aforesaid, shall be null and void."

The word *assigns* in this section does not mean subsequent mortgagees, but subsequent *purchasers*. This will appear when I come to speak of the right of subsequent mortgagees to redeem.

The mortgagor and his *assigns*, may redeem the mortgaged premises at any time within two years, by paying to the purchaser, or officer who sold the premises, the sum for which they were sold, with ten per cent. interest. On such payment being made, the sale, and certificate granted thereon, become null and void. Such are the rights of the mortgagor and his *vendee* under the statute. They are placed on the same footing. The subsequent vendee is regarded by the statute as the successor of the mortgagor, and in no other light. Now, had Johnson, the mortgagor, instead of Prickett, paid Windiate, and taken the assignment from him, it would have been a redemption or payment of the Windiate mortgage; and is payment by Prickett, and an assignment to him, standing in the place of the mortgagor, to be regarded in any other light? Can a grantee succeed to greater rights than his grantor had, when there is no fraud or concealment on the part of those claiming under, or in opposition to, his grantor, and where the grantee knew, or was bound to know, of the existence of such claims, when he purchased? It is immaterial whether Prickett had actual notice of complainant's mortgage, or not. It was duly recorded, and he was bound to take notice of it.

The seventeenth section of the act relates to redemption by subsequent mortgagees. It is in these words: "Any person

to whom a subsequent mortgage may have been executed, shall be entitled to the same privilege of redemption of the mortgaged premises that the mortgagor *might have [*334] had, or of satisfying the prior mortgage, and shall by such satisfaction acquire all the benefits to which such prior mortgage was or might have been entitled." This section, by securing to subsequent mortgagees the right of redemption, shows that the word *assigns*, in the eleventh section, was not intended to extend to them, but to subsequent vendees only. It is the duty of the mortgagor, or his vendee, who claims to be the owner of the land in fact, to pay off all incumbrances. Hence the statute, while it provides that a subsequent mortgagee, who redeems, shall acquire all the rights of the prior mortgage, makes no such provision in favor of a subsequent vendee, who is supposed to redeem for the purpose of discharging his estate of the incumbrance. Again, the subsequent mortgagee does not take the place of the purchaser at the mortgage sale. He succeeds to the rights of the prior *mortgage*, not of the *purchaser*. Had it been the intention of the statute to substitute him for the *purchaser*, it would have done so in express terms; and, where there were a number of mortgages, it would have provided for the several mortgagees' redeeming of each other. If complainant, then, had redeemed instead of Prickett, the only right he would have acquired would have been, to be reimbursed what he had paid, with interest, on foreclosing his own mortgage; and Prickett cannot stand on more favorable ground than complainant would have stood upon, had he redeemed.

The assignment does not alter the nature of the transaction; it cannot make that a purchase which was, in fact, a redemption. If Windiate had purchased of Burgess, the result would have been the same. He could not, at the same time, claim the rights, both of purchaser under the sale and grantee of the equity of redemption. As grantee of the mortgagor, he could have the land only after *payment of the [*335] incumbrances; and, having of his own accord, taken upon himself that character, he must take it with all its con-

sequences. He could not change from one to the other to suit circumstances, as interest might dictate,—for one purpose holding himself out as grantee of the mortgagor, and for another as purchaser under the mortgage sale,—saying to complainant, if he had come to redeem, that as grantee of the mortgagor, he himself had a right to redeem, or, if complainant, knowing that fact, had neglected to redeem, that he was the purchaser at the mortgage sale, and the premises had not been redeemed. The statute treats a redemption by the mortgagor, or his assigns, as payment. It should always be so construed when the mortgagor redeems, he being personally liable for the debt. But, when his vendee redeems, who is not personally liable for the mortgage debt, and there is an intervening mortgage between the one redeemed by him and his equity of redemption, the same rule should prevail as in case of redemption by a subsequent mortgagee. He should not lose what he has paid, because he cannot pay the intervening mortgage.

There must be a reference to a Master to compute the amount due on complainant's mortgage, and, on the coming in of his report, a decree must be entered that Prickett redeem in six months, or that the mortgaged premises be sold, and Prickett be first paid the $790 paid by him to Windiate, but without interest, as he has been in possession, and then complainant must be paid what is due him, and his costs, and the balance, if any, to Prickett.

*Lewis Benedict *v.* Samuel Denton and Selah B. Collins. [*336]

The declarations of an agent, made at the time of doing an act within the scope of his authority, and relating to the subject matter of the act, are evidence, as a part of the *res gestæ*; but statements subsequently made by him are not, because the latter are made without authority, and, for that reason, stand on the same footing with the declarations of another person.[1]

The seal of a corporation is, itself, *prima facie* evidence that it was affixed by proper authority, and the contrary must be shown by the objecting party.

This was a bill to foreclose a mortgage. The facts sufficiently appear in the opinion of the Court.

J. Kingsley, for complainant.

O. Hawkins, for defendant.

The Chancellor. The answer, which is not under oath, sets up payment. The mortgage bears date November 10th, 1837, and was given by Denton to the Bank of Washtenaw, to secure the payment to the bank of his note of the same date, for $1,108.32, payable three months after date, with interest. The note and mortgage, after they became due, were assigned by the bank, under its corporate seal, to complainant. The answer states that the note and mortgage were given to secure the payment of two drafts, drawn by N. J. Brown, on Denton, to pay his share of certain notes given by Brown, Denton, and

[1] See Homer *v.* Fellows, 1 Doug., 51; Converse *v.* Blumrich, 14 Mich., 109; Sisson *v.* Cleveland & Toledo R. R. Co., id., 489; Hammond *v.* Mich. State Bank, *ante*, 214.

But the acts and declarations of one assuming to act as agent for another are not evidence as against the alleged principal till the fact of agency is established by other evidence. Hatch *v.* Squier, 11 Mich., 185. See, also, Grover & B. Sewing Machine Co. *v.* Pollhemus, 34 id., 247; Kornemann *v.* Monaghan, 24 id., 36; Brighton *v.* Peters, 1 Gray, 139; Chicago & Great Eastern R. R. Co. *v.* Fox, 41 Ill., 100; Rawson *v.* Curtiss, 19 id., 456, 474; Maxey *v.* Hockethorne, 44 id., 437.

Charles H. Van Dorn, for real estate purchased by them in Wisconsin. That the drafts were sent by Brown, (who then resided at Chicago,) to E. S. Cobb, cashier of the Bank of Washtenaw, and were made payable at the bank; and that, subsequently, Van Dorn paid the notes of Brown,
[*337] *Denton, and Van Dorn. To prove these facts we have the depositions of several witnesses;—some of them testifying to the declarations of Cobb, who is dead. These declarations of the cashier are objected to as evidence in the case, and must, I think, be excluded from the consideration of the Court. The declarations of an agent, made at the time of doing an act, within the scope of his authority, and relating to the subject matter of the act, are evidence as a part of the *res gestæ;* but statements subsequently made by him are not, because the latter are made without authority, and, for that reason, stand on the same footing with the declarations of any other person. Cobb, it may be said, was the general agent of the bank; that, as cashier, it was his duty to receive and pay out moneys for the corporation, and consequently to receive the amount due upon the mortgage, and that, therefore, any admission made by him as cashier, and while in the actual performance of his official duties, should be received as evidence. It is unnecessary to decide this point, as the facts testified to do not present it. There is no evidence that Cobb ever did admit the note and mortgage were paid. The conversations testified to by Brown, had nothing to do with the business of the bank, but related to Cobb's private affairs. They are, therefore, clearly inadmissible. If they were to be received as evidence, they would by no means establish, to my satisfaction, the payment of the note and mortgage. Waiving all objection to the testimony, it seems to me too vague and indefinite, to prove a payment of the note and mortgage. It is by no means so full and clear as it should be for that purpose.

It is said the cashier had no authority to transfer the note and mortgage. The common seal of the corporation is affixed to the assignment, and the seal itself is *prima facie* evi-
[*338] dence that it was affixed by proper authority; and *the

contrary must be shown by the objecting party. Ang. & Ames on Corp. 115. Corporations act by their common seal; and it is not to be presumed that the officer having charge of it has affixed it to an instrument, without authority. The presumption is that he had authority, until the contrary is shown.

I am of opinion that the production of the corporation books could have been compelled on a *subpœna duces tecum*. The corporation is not a party to the suit, and, by the production of its books, would not be furnishing evidence against itself, in any other sense than as an assignor of a *chose in action*, who, not being a party to the suit, would be a good witness for defendant.

Reference to Master to compute amount due.

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*William Gould *et al. v.* Charles Tryon. [*339]

The service of a subpœna was set aside as irregular, where the copy delivered to the defendant varied from the original, in being tested on the 31st day of October, 1840, instead of 1843.

This was a motion to set aside the service of a subpœna as irregular.

The subpœna in this case was tested on the 31st day of October, 1843, and the copy served on the defendant varied from the original, being tested on the 31st day of October, 1840.

J. S. Abbott, in support of the motion.

E. B. Harrington, contra.

The Chancellor set aside the service of the subpœna as irregular, and cited 1 Edw. Ch. R. 631.

[*340] *Reeves *v.* Scully.

Rules of practice regulating the mode of applying for re-taxation of costs, and for setting aside the taxation for irregularity.

The Chancellor. Where a party applies for a re-taxation of costs, he must bring the question before the Court by petition or motion, specifying the items objected to as erroneously allowed by the taxing master. Or if there was irregularity in the taxation,—as the want of notice, or the like,—he must make a motion to have the taxation set aside on that account.

Henry W. Rood *v.* Erasmus W. Winslow, John F. Porter and Joseph G. Ames.

Where A. was pardoned, on condition he should secure the payment of a fine of $1,000 to the county, and the county commissioners took a mortgage to themselves instead of the county, the mortgage was held to be good, and the commissioners were declared trustees for the county, the law implying a trust from the nature of the transaction.

Where, in a conditional pardon, the person pardoned was ordered to secure the payment of $1,000 to the county, and the county commissioners obtained a mortgage for $1,150, the mortgage was held good for the $1,000, and void as to the residue.[1]

Bill to restrain a statutory foreclosure, and have the mortgage given up and canceled.

At the November term of the Circuit Court, for the county of Berrien, for 1838, one Shurte was convicted on three [*341] several indictments for larceny, and sentenced, on *two of them, to pay a fine of $500 each, and the costs of

[1] Affirmed in 2 Doug., 68. See the subject of duress considered in Ewell's Lead. Cases, 760., *et seq.*

prosecution, and on the other to a year's imprisonment and costs. February 9th, 1839, Shurte was pardoned on condition that he should secure to the county the fine of $1,000. The pardon made no mention of the costs, but required him to be set at liberty, "on securing the payment of the $1,000." Shurte and wife, on the 18th day of May, 1839, executed a mortgage to the defendants, "Erasmus Winslow, John F. Porter, and Joseph G. Ames, and their successors in office, commissioners of the county of Berrien aforesaid, of the second part," for the payment of $1,150 and interest, on the 8th day of November following;—the $150 being added for the costs of the three prosecutions. The common blank form was used, in drawing up the mortgage, which did not refer to the official capacity of the defendants, except as above stated. December 16th, 1839, Shurte and wife conveyed the premises to Herman Rood, who, January 24th, 1840, conveyed to complainant. Both conveyances contained covenants of seizin and warranty, and neither made mention of the mortgage; and the deeds and mortgages were recorded in the order in which they were executed. The money not being paid at the time, defendant proceeded to foreclose the mortgage by advertisement and sale under the statute, when complainant filed his bill to have the mortgage delivered up and canceled, and obtained an injunction to restrain the sale.

C. Dana, for complainant.

J. S. Chipman, for defendants.

The Chancellor. It is insisted that the mortgage should have been taken in the name of the county, and not in the name of the defendants, as commissioners, and *that [*342] it is therefore void. The first part of the proposition is true, but the conclusion drawn from it, is erroneous. Every organized county is a body politic and corporate, and, in its corporate capacity, may sue and be sued; purchase and hold land and personal estate, for the use of the county; borrow money, for the purpose of erecting and repairing county build-

ings, building bridges, and completing and repairing roads, as provided by law; and may make all necessary contracts, and do all other necessary acts in relation to the property and concerns of the county. R. S. 33, § 3. The commissioners of each county, by the law creating the office, which law is now repealed, were constituted a board for the transaction of county business. R. S. 39. All official business done by them should have been done in the name of the county, and not in their individual names. They were the servants or agents of the body politic, and their acts were its acts. The mortgage, therefore, should have been taken in the name of the county; but it is not void for the reason it was not so taken. In *Jackson* v. *Carey*, 8 J. R. 385, the deed was void for the want of a grantee capable of taking under the grant. The deed was made to "the people of the county of Otsego," who were not a corporation, and the Court in the case, say: "A grant, to be valid, must be to a corporation, or some person certain must be named, who can take by force of the grant, and who can hold, either in his own right or as a trustee." This was also the case in *Hornbeck* v. *Westbrook*, 9 J. R. 73. In the present case, there are no less than three grantees named in the mortgage, each of whom is capable of taking under the grant. It is not necessary to decide what effect, (if any) the words, "and their successors in office, commissioners of the county of Berrien," have upon the grant; whether they are to be regarded as de-
[*343] scriptive *of the persons of the grantees only, or as indicative of the interest they were to take, and creating them trustees for the county. That they are such trustees, there is no doubt. They admit it in their answer; and, without such admission, the law would imply a trust from the facts in the case, they having, as agents of the county, taken a security in their own names, which they should have taken in the name of the county.

The mortgage should have been for the $1,000 only. The pardon did not require the costs to be paid by Shurte. Defendants were therefore wrong in requiring him to give security for them; and to that extent, the mortgage is void. They were

not intended as a gratuity to the county, but exacted as a right, under the pardon, and consented to by Shurte to obtain his liberty; and complainant, having succeeded to the rights of Shurte in the mortgaged premises, is entitled to have them deducted from the mortgage.

The mortgage must be declared good for the $1,000, and void for all over that amount; and complainant must pay the $1,000 with interest, from the date of the mortgage, and defendants' costs, in six months. In default thereof, the bill must be dismissed with costs.

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*Lawrence Cavenaugh *v.* Elmore Jakeway [*344] and Ebenezer Jakeway.

Irregularities in a sale, under an execution, must be corrected by applying to the Court out of which the writ issued, to set the sale aside. There must be fraud to give this Court jurisdiction; irregularity is not sufficient.[1]

Demurrer to a bill to set aside a sale on execution.

A judgment was recovered in the Circuit Court for the county of Berrien, in April, 1840, by Jehiel Enos, against complainant, as principal, and one Johnson as surety, for $58.91 and costs of suit, and execution issued upon it to the sheriff, for $117.82, and levied upon the west half of the northwest quarter of section thirteen, town four south, of range eighteen west, and the north half of the northwest quarter of section twenty-four, of the same town and range, belonging to complainant. On the 20th day of July, 1840, the sheriff sold the two lots together, instead of separately as the statute requires. R. S.

[1] See Blair *v.* Compton, 33 Mich., 422; Campau *v.* Godfrey, 18 id., 44; Ross *v.* Mead, 5 Gilm., 171; Prather *v.* Hill, 36 Ill., 402; Gillespie *v.* Smith, 29 id., 481; Fergus *v.* Woodworth, 44 id., 374; McMullen *v.* Goble, 47 id., 67; Hay *v.* Baugh, 77 id., 530; Roberts *v.* Fleming, 53 id., 196; Winchell *v.* Edwards, 57 id., 41; Osgood *v.* Blackmore, 59 id., 261; Rigney *v.* Small, 70 id., 416.

324, § 9, to the defendant, Elmore Jakeway, for $131.40, and gave him a certificate for a deed in two years, unless the lots were redeemed within that time. Elmore Jakeway assigned the certificate to Ebenezer Jakeway, to whom the sheriff deeded the lots, after the expiration of the two years. The bill stated that the two lots were worth $1,500 when they were sold; that either one of them was at that time worth $300; and that complainant had been prevented from redeeming either one of them, by reason of their having been sold together.

Miller, in support of the demurrer.

Bacon, contra.

[*345] *The Chancellor. It was clearly the duty of the officer to have sold the lots separately; and by selling them together, he has probably incurred the penalty given by the fifth section of the act. When several known lots, tracts, or parcels, are levied on, the ninth section requires them to be separately exposed for sale. This, however, is directory to the officer merely, and a non-compliance on his part will not make the sale void. The irregularity must be corrected by applying to the court out of which the execution issued, to set the sale aside. Whether the irregularity would affect a purchaser, not a party to the suit, as in the present case; or whether, he being a a party, the Court would set aside the sale after the two years' redemption had expired, it is not necessary for this Court to decide; nor can any such consideration give it jurisdiction, where it has none in the first instance.

There must be fraud to give this Court jurisdiction; irregularity is not sufficient. Chancellor Kent said in *Shottenkirk* v. *Wheeler*, 3 J. C. R. 280, that there was no case in which equity had undertaken to question a judgment for irregularity. Every court has power to control its own process in such a way as to prevent the abuse of it. It has as much power over its process, as any other proceeding before it. *Stratford* v. *Twynam*, 1 Jac. R. 418.

The bill does not make out a case of fraud. It alleges the lots were worth $1,500, when they were sold, and that they sold for $131.40 only. If the sale had been absolute, the great inadequacy of price would be a strong badge of fraud; but it cannot be so considered, when it is recollected complainant had two years to redeem in, by paying the 131.40, with ten per cent. interest.

Demurrer allowed, and bill dismissed with costs.

[*346] *Cyrus Ingerson *v.* John Starkweather and others.

An agent, whether of the public or of individuals, who is authorized to sell property for the best price that can be obtained for it, cannot become the purchaser, either in his own name or that of another, whether the sale be public or private.[1]

To cut off the equities of the original parties to a promissory note, in the hands of a third person, the holder must not have received it in payment of an antecedent debt, but he must have parted with something for it at the time, or incurred responsibilities to a third person on the credit of it.[2]

Bill to have certain promissory notes delivered up and canceled.

April 8th, 1839, complainant purchased of defendant Starkweather, who was then clerk to the Superintendent of Public Instruction, the west half of the northwest quarter of section sixteen, town six south, of range ten west, and executed to him the notes in question, payable to him or order, in part payment. The lot purchased was a part of the school lands belonging to

[1] See Walton *v.* Torrey, Harr. Ch., 259; Beaubien *v.* Poupard, id., 206; Clute *v.* Barron, 2 Mich., 192; People *v.* Township Board of Overyssel, 11 id., 222; Dwight *v.* Blackmar, 2 id., 330; Ames *v.* Port Huron Log Driving & Booming Co., 11 id., 139; F. & P. N. R. R. Co. *v.* Dewey, 14 id., 477.

[2] Overruled on this point. See Bostwick *v.* Dodge, 1 Doug., 413; Outwite *v.* Porter, 13 Mich., 533; Baker *v.* Pierson, 5 id., 459.

the State. By law, the Superintendent of Public Instruction was required to sell all school lands at public auction, at not less than eight dollars per acre; and, after having offered them twice in that way, in different years, without finding a purchaser, he was to sell them at that price, at private sale. The bill charged that Starkweather called on complainant, and offered to sell him the lot, stating that he had purchased it, at one of the public sales, at eight dollars per acre; that no certificate had been given him for it, but that he had blank certificates by him, signed by the Superintendent, and, if they could make a bargain, he would fill up one to the complainant. That complainant, confiding in these representations, purchased the lot, and agreed to pay the eight dollars per acre to the [*347] school fund, and three *hundred and twenty dollars to Starkweather, for which last sum he executed to him his three promissory notes; and Starkweather filled up and delivered to him the following certificate:

"In the name of the people of the State of Michigan, I, John D. Pierce, Superintendent of Public Instruction, agreeable to the provisions of chapter one, title twelve, of the revised statutes, hereby certify, that at a private sale held pursuant to the statute aforesaid, on the eighth day of April, A. D. 1839, Cyrus Ingerson, of St. Joseph County, Michigan, for the sum of $640, has purchased the following described land, to wit: West half of the northwest quarter of section number sixteen, in township number six south, range ten west, containing eighty acres, according to the returns of the Surveyor General, at eight dollars per acre. And I do further certify that the consideration received therefor from the said purchaser, is the sum of sixty-four dollars, and that the consideration to be paid by the said purchaser is the sum of five hundred and seventy-six dollars, in nine equal annual payments, at an interest of seven per centum, to be paid annually at the office of said Superintendent of Public Instruction; and said installments may be paid before the same shall become due, by giving three months' previous notice to the said Superintendent. And in case of the non-payment of the said interest annually, and in

case of the non-payment of the said installments as they become due, by the said purchaser, or by any other person claiming under him, then this certificate shall be void and of no effect, and all the interest of the said Cyrus Ingerson, or of any person or persons claiming under him, to the aforesaid described land, shall be absolutely void, and the full title to such land, and the right to the possession thereof, shall revest in the State; and the said Superintendent may take *possession [*348] thereof, and sell the same, pursuant to the provisions of the chapter and title of the revised statutes aforesaid. Given under my hand and seal this eighth day of April, 1839."

The bill then charged that the lot had not been purchased by Starkweather, as stated by him, and that it had twice been offered for sale at public auction without being sold. It further stated that Starkweather had transferred the notes to Willard, without consideration; and that Willard had notice of the circumstances under which they had been given when he took them.

Starkweather admitted the sale of the lot, and the giving of the certificate, as stated in the bill. Denied that he represented himself to be the puschaser. Admitted he told complainant that he and John Norton, Junr., had purchased it, and that they had received no certificate; and that, if he wished to buy it, he could fill up a blank certificate to himself, and then transfer it to complainant, who must pay him $384, and take it subject to all payments to the school fund except the first. Complainant agreed to it; and, at his request, he filled up the certificate directly to him, to avoid the trouble and expense of an assignment from himself to complainant. He and Norton became the purchasers of the lot, October 17th, 1838, at a public auction at which he acted as auctioneer. The lot was struck off to Norton as purchaser, but for the benefit of Norton and himself; and minutes of the sale were entered in the book of sales, in pencil marks, as was customary at such sales. The Superintendent was not present at the sale. Defendant made the first payment on the land, amounting to sixty-four dollars. On the delivery of the certificate, complainant executed to him four

promissory notes;—one for sixty-four dollars, payable with interest on the first day of September thereafter;—
[*349] *one for one hundred dollars with interest payable on the first day of January thereafter—one for one hundred dollars, payable in one year, and one for one hundred and twenty dollars, with interest, payable in two years from the first day of January thereafter. About a month after these notes were given, the last three of them were exchanged with complainant, at his request, for three others bearing date April 8th, 1839, viz: one for one hundred dollars, payable in one year, one for one hundred dollars, payable in two years, and one for one hundred and twenty dollars, payable in three years, from and after the first day of January, 1840, with interest. On December 20th, 1839, these last notes were transferred to Willard, in good faith, in consideration and payment of professional services previously rendered, and subsequently to be rendered.

Willard denied he had any knowledge, information, belief, or suspicion, that the notes had been executed under the circumstances stated in the bill, when they were transferred to him. He purchased them in good faith, December 20th, 1839. They were taken by him in payment of professional services rendered and to be rendered. He was, at the time, foreclosing a mortgage for Starkweather, who would be indebted to him $40 on that account when completed, and he had previously rendered other services to the amount of $5. At the time of putting in his answer, he had many demands in his hands for collection, and suits to prosecute, for Starkweather, who was then indebted to him for professional services about one hundred dollars, and would be indebted to him, when the whole of said business was brought to a close, in all, about two hundred dollars. He had no knowledge of any difficulty between complainant and Starkweather about the notes, until some time in May, 1840, when he was spoken to on the subject by complainant's solicitor.
[*350] *Replications were filed to the answers, and the cause was heard upon the pleadings.

L. F. Stevens, for complainant.

E. Bradley, for defendants.

The Chancellor. The complainant is entitled to relief. Starkweather represented himself as the owner of the lot, or that it belonged to himself and Norton, when he sold it to complainant. In what way, according to his own statement, did they acquire an interest in it? By purchasing it at a public auction conducted by himself, as agent and auctioneer for the State. He could not, without a breach of his duty to the State, purchase at such sale. It is contrary to every sound principle of equity, to allow an agent, who is authorized to sell property for the best price that can be obtained for it, to become the purchaser himself. It is immaterial whether the sale be public or private; whether the agent purchase in his own name or that of another. The object of the rule is to secure fidelity on the part of the agent to his principal; and it is as applicable to public agents as others, and should, if anything, be enforced more rigidly against them, as they have greater opportunities of abusing their trust.

Starkweather appears to have been aware of the impropriety of his appearing as a purchaser at the sale, for the lot was bid off in Norton's name alone, although Starkweather was to have an interest in it. Was Norton at the sale, and did he bid it off? The answer is silent on this point. Defendant was interrogated by the bill as to what persons were present at the sale;—he names some two or three, but, says not a word about Norton. Neither does he say in express terms Norton was the purchaser. His language is that "the land was struck off to John Norton, Junr., *as the purchaser*, for the benefit of him- [*351] self the said defendant, and John Norton, Junr."

Suppose the sale genuine: Norton and Starkweather, by omitting to comply with the terms of the sale, had ceased to have any interest in the lot when it was sold to complainant. The law required one-tenth of the purchase money to be paid in cash, and the remainder of it in annual installments of ten per cent., at an interest of seven per cent., to be paid annually. R. S. 251. The first payment was not made at the sale, nor until

Starkweather had sold to complainant. This is clearly to be inferred from Starkweather's answer, and if the fact had been otherwise, he would probably have stated it. The public sale was on October 17th, 1838; and on the 8th day of April, 1839, nearly six months after, when he sold to complainant, he and Norton had not procured a certificate. In his answer, he says, he proposed to sell the lot to complainant, "subject to all payments excepting the first, *to be made* to said Superintendent." In another part of his answer he says that "he paid to the said Superintendent the sum of sixty-four dollars, being the first payment to be made on the purchase of lands, according to the law regulating the sale of said school lands; but at what time, whether before, or after he sold to complainant, he does not state. The certificate to complainant is dated April 8th, 1839, instead of October 17th, 1838, when the public sale took place; the State thereby losing nearly six months' interest. Why was not the certificate dated back to the time of the public sale? Why does it state the land was sold "at a private sale"?

I do not rest my decision on this ground alone, but on another and stronger ground; that the sale of October 17th was not a *bona fide* sale, but intended to stand as such [*352] if the land could be sold to advantage; otherwise to *be abandoned. The circumstances already stated show this pretty conclusively to my mind, but there are others. Norton does not appear to have ever had anything to do with the purchase. He was not at the public sale, nor does it appear that he had an agent there. He had nothing to do in making the bargain with complainant; the notes were made payable to Starkweather, or order, and were afterwards transferred by him to Willard, under circumstances that exclude all idea of Norton's having any interest in them. We hear nothing of Norton in these transactions, or in the payment of the sixty-four dollars to the Superintendent.

The land having been twice offered for sale at public auction, without being in fact sold, was subject to private sale, at the minimum price of eight dollars per acre; and complainant, or

any other person wishing to purchase it, was entitled to it at that price. Complainant was induced to pay more for it by reason of the representation of Starkweather, that it belonged to him, when in fact it belonged to the State.

Willard cannot be regarded as the holder of the notes for a valuable consideration, and without notice, to a greater amount than the value of the services rendered by him, under the agreement with Starkweather, before he had notice of the manner in which they had been obtained. He gave neither money nor property for them. He took them in payment of an antecedent debt, and professional services to be rendered. So far as such services were rendered before notice to him, he is entitled to the protection of the Court; but no further. To cut off the equities of the original parties to a note, in the hands of a third person, the holder must not have received it in payment of an antecedent debt, but he must have parted with something for it at the time, or incurred responsibilities to *a third person on the credit of it. *Rosa* v. [*353] *Brotherton*, 10 Wend. R. 85; *Wardell* v. *Howard*, 9 Wend. R. 170, *Codington* v. *Bay*, 20 J. R. 637; *Hart* v. *Palmer*, 12 Wend. R. 523.

The services rendered by Willard before notice cannot amount to a great deal, but there must be a reference to a Master to ascertain the amount.

William Gould *et al. v.* Charles Tryon.

Where a judgment creditor's bill was filed on an execution returned unsatisfied nearly nine years before, a motion for the appointment of a receiver was denied.

An execution must be returned within a reasonable time before the filing of a judgment creditor's bill, and nine years is not a reasonable time.

Motion for the appointment of a receiver, on a judgment creditor's bill.

E. B. Harrington, in support of the motion.

J. S. Abbott, contra.

The Chancellor. Complainants, in May, 1834, obtained a judgment in the Circuit Court of Wayne county, against Tryon, and, in October following, sued out execution, returnable on the first day of December thereafter, on which day it was returned unsatisfied by the sheriff. No step appears by the bill to have been taken for the collection of the judgment, from that time until complainants filed their bill in this Court, on October 31st, 1843; and, on that account, the motion for a receiver [*354] is resisted,—*nearly nine years having elapsed between the return day of the execution, and the filing of the bill.

I think the objection a good one. The sheriff's return shows that defendant had no goods or chattels, lands or tenements, to satisfy the judgment, on the first day of December, 1834, when it was returned; but it does not show, and the law does not presume, that he had no property liable to execution nine years after, or nearly that, when the bill was filed. At law, a party cannot take out execution on a judgment in his favor, after two years from the time he was entitled to it, or from the return day of a preceding execution, if he has taken out one within that time, without a special application to the Court, and leave given for that purpose. Laws 1841, p. 134.

If a bill may be filed nine years after the return of an execution, there is nothing to prevent filing it at any time before the judgment is outlawed. Such a construction would be contrary to the spirit of the statute, which was intended to give the party a remedy in this Court, where he had made a *bona fide* attempt to collect his judgment at law, within a reasonable time before filing his bill. Nine years is unreasonable for that purpose: and there is no hardship in requiring a party who, after the return of an execution unsatisfied, has lain by so long, without taking any measures to enforce the collection of his judgment, to take out a new execution and have it returned, before he comes here for relief.

Motion denied.

*Charles H. Carroll and Lucius Lyon *v.* [*355] Potter *et al*

Where the alleged fraud set up in defense of a bill consists of a variety of circumstances, it should be taken advantage of by answer, and not by plea.[1]

An assignee of a contract cannot insist upon fraud used in the making of the contract on the party under whom he claims.

Hearing on a plea.

C. Dana, in support of the plea.

Church & Johnson, contra.

The Chancellor. The plea must be overruled. It is bad on several accounts. It is multifarious, or double. *First*, it sets up fraud on the part of Carroll and Lyon in the contract they entered into with Winsor, for the purpose of avoiding that contract; and, *Secondly*, it states that that contract was annulled. The alleged fraud consists of a variety of circumstances; and, where that is the case, the defense should be made by answer and not by plea, as the examination in proof of the fraud must still be at large, and the effect of allowing a plea in such case would be to have the judgment of the Court on the circumstances of the case, before they were proved. Coop. Eq. Pl. 223.

There is a still further objection to the facts and circumstances stated in the plea. They do not appear to me to be a good defense to the bill. As assignee of the contract, Calkins cannot insist upon the fraud. Besides, he purchased the mortgaged premises of Macy, and took a deed from him, subject to the mortgage.

Plea overruled.

[1] See Albany City Bank *v.* Dorr, *ante*, 317.

[*356] *Charles Seymour *v.* Horace R. Jerome and Edwin Jerome.

A complainant may, at any time before there has been an interlocutory or final decree in a cause, dismiss the bill of course, on payment of costs.[1]

Where an interlocutory order had been entered by consent of parties, operating as an adjudication to some extent on the rights of the parties, the Court refused to allow the complainant to dismiss his bill.

This was a bill for a settlement of partnership accounts between the complainant and defendant Horace R. Jerome. Edwin Jerome was made a party by reason of his claiming to be the owner of a bond and mortgage, executed by one Shepherd to Horace R. Jerome, which complainant was to pay, and which he alleged he had paid to H. R. Jerome, in their partnership dealings. The defendants answered, and, after a replication had been filed, an interlocutory order was entered, by consent of parties, for an account of the partnership business, to be taken and stated between the parties by a Master.

E. S. Lee, for complainant, moved for leave to dismiss the bill on such terms as the Court might deem equitable.

E. C. Seaman, for defendants, opposed the motion.

The Chancellor. The interlocutory decree, or order, was entered by consent of parties. It admits the partnership, and the right of complainant to an account of the partnership dealings. To that extent it is an adjudication on the rights of the parties. A complainant may, at any time before there has been an interlocutory or final decree in a cause, dismiss his bill of course, on the payment of costs. This is the general rule, but the present application does not come within it.

Motion denied.

[1] See Jerome *v.* Seymour, *post*, 359.

*Charles W. Whipple *v.* Charles H. Stewart. [357*]

The time fixed by the Master for the service of a summons, should be stated in the summons itself, or form a part of the underwriting, where the latter is necessary to inform the party of the object of the hearing; and the underwriting, as well as the summons, should be signed by the Master.

Where a defendant appeared before a Master at the return of a summons, and objected to his proceeding, on the ground that no time had been fixed for the service of the summons, *it was held*, that such appearance was no waiver of his right to make such objection.

Where proceedings are to be had under an order of reference to a Master, it is not necessary to serve a copy of such order on defendant with the Master's summons, but he is bound to take notice of it without service.

This was a judgment creditor's bill.

A motion was made for an attachment against Stewart, for not submitting to an examination before the Master, on an order for the appointment of a receiver; and for refusing to assign his property to the receiver.

A. Davidson, in support of the motion.

J. F. Joy, and C. H. Stewart, in person, contra.

The Chancellor. Two objections are taken to the motion; *first*, that the Master did not fix a time for the summons to be served on defendant previous to the hearing before him, as required by the seventy-second rule of the Court; and, *second*, that a copy of the order for the appointment of a receiver was not served with the summons.

The summons was dated January 25th, 1844, and required defendant to appear before the Master on the thirty-first day of that month, and was underwritten, "To proceed to examine the defendant Charles H. Stewart, and take an assignment from him to the receiver, pursuant to *the order of [*358] reference." The summons and underwriting were both

signed by the Master; and defendant appeared at the time and place appointed, and made the first of the above stated objections, before the Master, which was overruled. The other objection was not then taken, and is now made for the first time.

The summons was served on the 25th day of January, the day it bears date, and, in all probability, a greater length of time before defendant was required to appear, than the Master would have directed, under the circumstances of the case, had he fixed the time at all. But the seventy-second rule requires the summons to be served upon the adverse party, or his solicitor, such time previous to the day appointed for hearing as the Master may deem reasonable, and *direct*, taking into consideration the nature of the matter to be examined, and the residence of the parties. By appearing and taking the objection before the Master, defendant certainly did not waive it, as was insisted on the argument. The time fixed by the Master for the service of a summons, previous to the hearing, should be stated in the summons itself, or form a part of the underwriting, where the latter is necessary to inform the party of the object of the hearing; and the underwriting, as well as the summons, should be signed by the Master.

The second objection, it being a question of practice merely, and not having been taken before the Master, was waived by the appearance, conceding it would have been a good objection had it been insisted on at the time; which concession, however, I do not make. The Master must have a copy of the order to base his proceedings upon, but there is no good reason for requiring a copy to be served on defendant. He is bound to take notice of the entry of the order at his peril; and, [*359] if he has not seen it *before, he will have an opportunity of seeing and examining it in the Master's office, and of ascertaining what it requires of him. The order is to be executed in the presence, and under the direction of a Master; and, in this respect, differs materially from an order requiring a party to do some act without the intervention of a Master, as to put in an answer within a specified time, or the like.

Motion denied.

Edwin Jerome *v.* Charles Seymour.

Where leave is given to complainant to dismiss his bill conditionally, the defendant may, until the condition is complied with, consider the case as in Court or out of Court, at his discretion; and may either proceed in it, or consider it dismissed and apply to the Court to enforce the payment of his costs.[1]

Where leave had been granted complainant to dismiss his bill on payment of costs, and the order was entered generally without mentioning costs, on application of the defendant, it was ordered to be amended so as to correspond with the terms on which leave to dismiss was granted.[2]

At the last motion day leave was granted to complainant to dismiss his bill, on payment of defendant's costs; and an order was entered dismissing the bill generally, without making any mention of the costs. The defendant, by petition, asked for an amendment of the order, so as to make the dismissal of the bill depend on the payment of his costs.

E. S. Lee, in support of the motion.

E. C. Seaman, contra.

The Chancellor. The motion must be granted. As the order now stands, the bill is dismissed, and defendant *loses his costs, as there is no mention of them in the [*360] order dismissing the bill. Leave was given complainant to dismiss his bill conditionally, that is, upon the payment of defendant's costs; and the order should have been so entered. The effect of such a dismissal is that complainant is not out of Court, unless at the election of the defendant, until he has paid, or offered to pay, the costs. Until the costs are paid, defendant may consider the case in Court, and proceed in it as if no

[1] See Seymour *v.* Jerome, *ante*, 356.

[2] See Bates *v.* Garrison, Harr. Ch., 221; Emory *v.* Whitwell, 6 Mich., 474, amendment of judgments in general; Foster *v.* Alden, 21 id., 507, justice of the peace not authorized to amend his record of a judgment.

order had been entered; or he may consider the bill as dismissed, and apply to the Court to enforce the payment of his costs, according to the implied agreement to that effect contained in the order. *Cummins* v. *Bennett*, 8 Paige R. 79.

Motion granted.

[*361] *Caroline E. Bird, Executrix, and Charles W. Lane, Executor, &c., of Ira R. Bird, deceased, *v.* John Hamilton.

The intention of parties to an instrument, when that intention is apparent from the whole instrument, and not repugnant to any rule of law, will control the meaning of a particular word or phrase, unguardedly used, and seeming to indicate a different intention.[1]

It is the intention of parties, rather than the language employed to express their intention, that courts chiefly regard.[2]

Where the question of partnership arises, not with third persons, but between the parties themselves, the agreement out of which the supposed partnership arises, is to be construed as any other instrument between the same parties.

Where a party had failed to perform the preliminary conditions, upon the compliance with which a partnership was to be formed, and the other party to the agreement, to enable him to perform, furnished his own capital, and for a short time carried on the business in the name of the proposed firm, *it was held*, that this was no waiver, and could not entitle the defaulting party to the rights of a partner.

A waiver should not be implied from slight circumstances.

This was a bill for an account of copartnership property and effects.

Complainants filed their bill in this Court, June 29th, 1842, stating that, in December, 1839, their testator, Ira R. Bird, and the defendant, had it in contemplation to form a copartnership,

[1] See Bronson *v.* Green, *ante*, 56; Gray *v.* Gibson, 6 Mich., 312.

[2] See note 1, *supra*.

for conveying the United States mail from Niles, in the State of Michigan, to Chicago in the State of Illinois; and that, on the twenty-third day of that month, with a view to such contemplated copartnership, Bird bid off a contract for carrying the mail on said route, in four-horse post-coaches, pursuant to the instructions, conditions, and provisions, contained in a contract for carrying said mail, afterwards entered into by Bird and Hamilton of the one part, and the United States of America of the *other part; a copy of which was an- [*362] nexed to the bill. This contract for conveying the mail was to commence on the first day of July, 1840, and to continue in force until June 30th, 1842. That, May 16th, 1840, Bird and Hamilton entered into the following articles of agreement:

"Articles of agreement and contract, made this sixteenth day of May, A. D. 1840, between Ira R. Bird, of Ypsilanti, and John Hamilton, of Birmingham, both of the State of Michigan, witnesseth: That, whereas, the said Bird did obtain from the Post Office Department a contract for conveying the mail, from Niles, in the State of Michigan, to Chicago, in the State of Illinois; and whereas, the said Bird agrees, and hereby does associate the said Hamilton with him in said contract for conveying the mail, which is to commence on the first day of July, A. D. 1840, and to terminate on the thirtieth day of June, A. D. 1842; and whereas, the said Hamilton has, and does agree to superintend said business personally, in consideration of his receiving two-thirds of the profits or loss of said business, of carrying the said mail and passengers; it is therefore agreed to enter hereby into partnership, for the special business of carrying the mail and passengers between Niles and Chicago aforesaid. The said Bird is to furnish one-third part of the capital or stock for said business, and to receive one-third part of the profits or loss of said business; and the said Hamilton is to furnish two-thirds of the capital or stock of said business, and to receive two-thirds of the profits or loss of said business. The business to be conducted under the name and style of Bird and Hamilton. And whereas, the said Hamilton will have the gen-

eral direction of business on the road aforesaid, he therefore hereby agrees to bind himself to furnish to the said Bird, a full and perfect exhibit of the receipts and expenditures ap-
[*363] pertaining to said business, and pay over to said *Bird any surplus in his hands; and the said Bird, if there is a deficit, hereby agrees to pay to the said Hamilton one-third of said deficit. The said parties hereby agree and bind themselves to do all in their power to promote the interest of the Detroit and Chicago line of stages, as it now runs on the Chicago road, and for that purpose, to receive fare through, and to settle balances once a month, if so often required by either party. Neither party to this instrument shall sell his interest without giving to the other the first right of purchase, at the price offered by another. At the expiration of said mail contract, if the said parties do not re-obtain the same, the stock shall be divided, or sold, each party receiving his *pro rata*, to wit, the said Bird one-third, and the said Hamilton two-thirds, of said stock or partnership moneys or effects of every description."

The bill then stated that, to perform their contract with the government, they, in the name of Bird and Hamilton, purchase, and procure to be purchased coaches, horses, and other stock. That some of the coaches were purchased by Bird, of Gilbert & Eaton, of Troy, in the State of New York, and the remainder of the stock of William H. Overton & Co., who held the previous mail contract on the route. That the purchase of Overton & Co., was made by Hamilton in his own name, on account of some misunderstanding and bad feeling existing at the time between Overton and Bird, but for the use and benefit of the firm. That one-fourth of the purchase money was paid down, and the remaining three-fourths were to be paid,—one-fourth on the first day of January, 1841, one-fourth on the first day of April following, and the remaining fourth on the first day of July thereafter; which payments, amounting in all to $6,300, were made, except the first, out of the receipts
[*364] and profits of the mail contract, and the *transportation of passengers. That it was the intention of Bird and

Hamilton to borrow, on the credit of the company, the money necessary to stock the road, and to repay it from the receipts of the road; and that the amount necessary for that purpose was borrowed by them. That Hamilton had received on the mail contract about $15,000, and that what had been received from passengers was equal to the expenses of running the road. That the copartnership was carried on by the parties, each devoting his time and attention to it, until October 25th, 1840, when Bird departed this life, leaving a last will and testament, and complainants his executrix and executor. That Hamilton took possession of the coaches, horses, and other stock belonging to the firm, amounting to about $8,000, and the books and other evidences of debt, and excluded complainants from all participation in, and knowledge of the business, and refused to come to any settlement with them.

Defendant, by his answer, denied that in December, 1839, Bird and himself were in consultation to form a copartnership to carry the United States mail, from Niles to Chicago; and stated that there was no consultation relative to such partnership, until March, 1840, when Bird informed him he had, the preceding September, put in proposals to the Post Office Department at the city of Washington, for carrying the mail on said route for two years, commencing July 1st, 1840, at an annual compensation of $8,400; that his proposal had been held under consideration by the department until that present month, when he was notified they would be accepted, if he would abide by them, and take the contract with the terms and conditions annexed to it by the department. Bird also stated that he had, in the mean time, taken another contract, which made it inconvenient for him to attend *per- [*365
sonally to carrying out the terms of the government; and he then proposed to enter into a copartnership with defendant, for transporting the mail and passengers on said route, as stated in the bill. Defendant afterwards went to Chicago, over said route, to see and become acquainted with it, and, on his return, it was agreed a copartnership should be formed between them; and on May 16th, 1840, the articles of agree-

ment set out in the bill were drawn up and signed by the parties. After they had so agreed to become partners, and not before, Bird notified the department that he and defendant would take the contract, which was executed by defendant and Bird of the one part, and the United States of the other part, on the first day of June, 1840.

Defendant admitted some of the stock for carrying on the proposed partnership, consisting of coaches and the like, amounting to $700, was purchased of Gilbert and Eaton, on account of the proposed co-partnership. Bird stated he was going to Washington, New York and Albany, on his own business, and would make any purchases for the proposed partnership, without expense; and, with a view to making such purchases he was furnished with a certificate of defendant's ability to meet his pecuniary engagements. On making such purchase, a draft was drawn by Bird for the amount, on the Post Office Department at Washington, to be paid out of moneys to be received on the mail contract, which draft was subsequently paid by the department.

July 1st, 1840, defendant placed upon said route, for the transportation of passengers and the mail, sixteen valuable horses and one coach, worth altogether $1,280, and for that purpose also, about the same time, purchased of William H. Overton & Co., stock to the amount of $6,387. This purchase was not made in defendant's name, for the [*366] *reason stated in the bill. The contract for the purchase was made some time previous to July first, and was intended for the proposed co-partnership. Its terms were, one-fourth to be paid July 1st, 1840, and the remaining three-fourths to be secured by negotiable promissory notes, payable in six, nine and twelve months, with responsible indorsers, certified to be good by the Bank of Michigan. After the terms of the purchase had been agreed on, defendant communicated them to Bird, and requested him to provide his third of the money to be paid, and securities to be given, which he wholly failed to do.

Sickness in defendant's family prevented his being at Niles

on the first of July, and until the eighth of that month; but he sent the horses and coach above mentioned, under charge of an agent, and requested Bird to be there on that day, that there might be no failure in carrying the mail. Bird was there on the first of July, but Overton & Co. would not permit him, or defendant's agent, to take possession of the property agreed to be purchased of them, until the agreement for the purchase was fulfilled. On the eighth of July defendant arrived at Niles, and found Bird had wholly failed to perform the agreement on his part, and defendant paid Overton & Co. the whole of the first installment, and gave his indorsed promissory notes for the others, as required by the contract.

Defendant suffered much embarrassment in being compelled to pay the whole of the first installment; and he then requested Bird to procure the money he was to advance, and to execute securities to him, defendant, for the one-third part of what was still to be paid, when Bird placed in his hands $60, and stated he would endeavor to fulfill his part in August.

In consequence of Bird's failure, defendant was compelled to advance, during the month of July, about $700, *for necessary repairs, and current expenses. On the [*367] 6th day of September, 1840, he called on Bird again, to fulfill the articles of agreement between them of May 16th, when Bird stated it was out of his power to raise the money, or procure the necessary sureties; to which defendant replied that he must perform on his part, or relinquish any interest he might claim to have in the proposed copartnership and mail contract. In the month of September, defendant had to raise, and expend in the business, about $900 more, in cash; and in the last of September, or beginning of October, he called twice on Bird to fulfill his agreement, when Bird stated he was unable to do so, and that defendant must take the business, and do the best he could with it; and he then relinquished, and gave up to defendant all his interest in the business;—never afterwards made any attempt to fulfill his part of the articles of agreement;—never advanced any money or executed any securities, or pretended to have any interest in the business.

It was not proposed to borrow money on the credit of the company to stock the road, nor was any borrowed on the credit of the company; but the whole capital was furnished as above stated. The business was not carried on in the name, and for the benefit of Bird and Hamilton. Defendant denies the firm ever had an existence, or that Bird ever expended any money in the business. The sixty dollars had not been returned to Bird. There was a replication to the answer, and testimony was taken which it is unnecessary to state, as it sufficiently appears in the opinion of the Court.

A. D. Fraser, for complainant.

J. F. Joy, for defendant.

[*368] *The Chancellor. That part of the answer in which defendant says Bird relinquished to him all his interest in the business, is not responsive to the bill; and, as it has not been proved, must be thrown out of the case altogether.

It is insisted however, on the part of defendant, that the articles of agreement of May sixteenth, did not constitute a partnership, and should be regarded only as a contract for a copartnership to commence *in futuro*. That the furnishing of capital by the respective parties, in the proportion stipulated by the articles, was a prerequisite to the commencement of the partnership. That neither party was bound to furnish his proportion of stock, unless the other was ready and offered to furnish his; and that Bird never furnished any part of the capital employed in the business, or was acknowledged by Hamilton as a partner.

The agreement of May sixteenth did not, of itself, create a partnership. It was a contract for a partnership to be formed between the parties on the first day of July following. The language, "It is therefore agreed to enter hereby into partnership," imports a partnership in *præsenti*, but no rule of construction is better settled, than that the intention of the parties to an instrument, when that intention is apparent from the whole instrument, and not repugnant to any rule of law, will

control the meaning of a particular word, or phrase, unguardedly used, and seeming to indicate a different intention. *Jackson* v. *Myers*, 3 J. R. 388; *Jackson* v. *Clark*, id. 424; *Ives* v. *Ives*, 13 J. R. 235. It is the intention of the parties, rather than the language employed to express their intention, that courts chiefly regard.

On the sixteenth day of May, 1840, the parties agreed to become partners, in a contract with the government for the transportation of the mail between Niles and Chicago, *in four-horse post-coaches, for two years, commencing [*369] on the first day of July of that year, and in the transportation of passengers in connection with the mail. Bird was to furnish one-third of the capital or stock necessary for the business, and Hamilton two-thirds; and the profit and loss were to be divided between them in the same ratio. The business of the partnership could not be entered upon until the first of July. It was to commence on that day. It seems, therefore, but reasonable that the parties intended the partnership to commence on that day, and not before. The business required a large capital in horses, coaches, harness, &c., to be furnished by the parties; but when was this capital to be furnished? The articles of agreement do not, in express terms, fix any particular time, and yet there can be no doubt it was not to be furnished immediately, or before it was wanted for carrying into execution the contract with the government; neither was the partnership to commence until that time.

If this construction of the articles of agreement be correct, it follows, that either party had a right to require the other to furnish his portion of capital, as a *sine qua non* to the formation of the partnership. Did Bird furnish his part of the capital, or was it waived by Hamilton? The case must turn upon the answer to be given to these questions.

The contract with government for carrying the mail, and with Gilbert and Eaton for the two coaches, I do not consider partnership contracts, for there was no partnership then in existence. These contracts were entered into about the first of June, and must be regarded as joint contracts made by the

parties, not as partners, but in their individual capacity, with a view to, and for the benefit of, the partnership subsequently to be formed. By them neither party contributed any-
[*370] thing as capital. Bird had no *exclusive interest in the mail contract, which was not consummated until June first, and after Hamilton had agreed to become a joint contractor with him. Neither did he pay, or agree to pay, for the coaches purchased of Gilbert and Eaton, with his own money, but gave them a draft on moneys to be received by the future partnership for carrying the mail. He consequently contributed nothing as stock to the partnership, by the part he took in those contracts.

If I am correct in the view I have taken of these contracts, Bird never furnished any capital whatever, unless the sixty dollars he handed to Hamilton are to be considered in that light, and of that I shall have occasion to speak hereafter. Hamilton furnished sixteen horses and one coach, worth together $1,280, and purchased the stock of Overton & Co. for $6,387, one quarter of which he paid in cash, and secured the balance in six, nine, and twelve months. The contract with Overton & Co. was made by Hamilton in his own name, but was intended at the time for the benefit of Bird as well as himself, on his paying his third of what was to be paid down, and securing his third of the payments on which credit was to be given. This Bird fails to do, and Hamilton had to make the first payment out of his own funds, and to get two friends to become his sureties for the future installments.

Bird was at Niles on the first of July. He went there at the request of Hamilton, but he was not then, or at any other time, ready to perform his part of the contract between Overton & Co. and Hamilton; which was to be consummated on that day. He appears to have taken an interest in the business at that time, and he undoubtedly then hoped soon to be able to perform on his part. Hamilton appears to have indulged a like hope, for he afterwards applied to him repeatedly for that
[*371] purpose; and the *books, for something like thirty days, until Hamilton lost all hopes of his ever performing,

were kept in the name of Bird and Hamilton, but after that, in the name of Hamilton alone. This circumstance should not be used to the disadvantage of Hamilton. It should not be construed into a waiver of the agreement requiring Bird to furnish a third of the capital. To give such a construction to what was intended as a favor to Bird, and nothing more—that is, to permit him to reap the benefits of a contract, by performing on his part, after the time for that purpose had elapsed,—would be hard indeed, and saying to persons hereafter, in like circumstances, show no indulgence whatever to a defaulting party, or it will be construed into a waiver of your rights.

There is no evidence of a waiver, and it certainly should not be implied from slight circumstances. It is hardly reasonable to suppose Hamilton intended to give Bird the benefit of his services, and of the $8,000 capital invested by him in the business. The complainants seem to have been aware of this difficulty, for they state in their bill the parties were to borrow money on the credit of the firm, to stock the road, and to repay it from their receipts; and that money was actually borrowed by them for that purpose. The answer positively denies any such understanding, or that any money was borrowed by the firm. And this allegation of the bill is unsupported by testimony, except the evidence of Lorenzo Dow Bird, who says there was an understanding, or agreement, that the money necessary for the *first* payment should be borrowed on the credit of the firm; and he thinks some three hundred dollars were borrowed of a bank in Jackson. The witness is not positive any money was borrowed; he *thinks* it was borrowed; and the agreement or understanding to which he testifies is not only denied by the answer, but is *in direct contravention [*372] to the articles of agreement, which speak of capital or stock, and not of credit.

Hamilton gave receipts in the name of Bird and Hamilton, for the mail money, from time to time, as it became due, and they are adduced as evidence of a partnership. Hamilton and Bird, as already stated, were joint contractors for carrying the

mail. Suppose Bird, after making the contract, had refused to have anything to do with carrying the mail, and Hamilton, as he was equally liable with Bird for a non-performance of their contract, to save himself, had gone on and fulfilled the contract with the government; would he not have been entitled to the mail money? And would he not have given receipts in the name of Bird and Hamilton? The case supposed is the one before the Court, if Bird, by reason of his failure to comply with the articles of agreement, was not a partner with Hamilton.

As to the sixty dollars, Hamilton did not receive it as performance of the articles of agreement by Bird, who, at the time he paid it, promised to pay the balance of his share of the first payment, and to furnish his part of the securities. It was not intended by the parties to secure the rights of Bird under the articles, unless the promise made at the same time was afterwards performed.

The question is one of partnership between the parties themselves, and not as to third persons. Individuals, who are not partners in fact, are sometimes liable as partners to third persons, on account of holding themselves out to the world as partners. But that is not the question in the present case, which is one of partnership between the parties; and, when that is the case, the agreement out of which the supposed partnership arises, is to be construed as any other agreement between the same parties.

The present case is not, I confess, without its difficul-
[*373] ties.* It is peculiar in many of its features, but, after the best consideration I have been able to give it, I am of opinion that Bird and Hamilton were not partners under the articles of agreement of May sixteenth, by reason of Bird's failure to furnish his share of the stock. *McGraw* v. *Pulling*, 1 Freeman R. 357.

Bill dismissed, but without costs, as complainants are executors, and appear to have acted in good faith in bringing their suit.

Charles H. Carroll *v.* Randall S. Rice, Administrator of the Estate of Nehemiah O. Sargeant, deceased, The President, Directors and Company of the Farmers' and Mechanics' Bank of Michigan, John A. Welles, Catharine C. Sargeant and Lucius Lyon Sargeant.

Fraud vitiates all contracts, at the election of the party injured; but he must make his election on the discovery of it, or within a reasonable time thereafter, whether he will rescind the contract, or consider it good, and resort to an action on the case for damages.

If the condition of the property has been so changed that the parties cannot substantially be placed back where they were before the sale, the vendee must seek redress by an action on the case.

A party seeking to set aside a conveyance on the ground of fraud, must be prompt in communicating the fraud when discovered, and consistent in his notice of the use he intends to make of it.[1]

In a suit brought to set aside a bond and mortgage for purchase money, on the ground of fraud, the mortgagee being dead, and his estate insolvent unless the bond should be paid, the Court, although it refused, under the circumstances of the case, to rescind the contract, retained jurisdiction under the general prayer of the bill, on the ground that it could give more full relief than a court of law, and awarded an issue to ascertain the damage which complainant had sustained by reason of the alleged fraud.[2]

*This was a bill to rescind a sale of real estate, &c. [*374] The facts necessary to an understanding of the several points decided, are stated in the opinion of the Court.

[1] See as to *laches*, Street *v.* Dow, Harr. Ch. 427; McLean *v.* Barton, id., 279; Campau *v.* Van Dyke, 15 Mich., 378; De Armand *v.* Phillips, *ante*, 186; Schwarz *v.* Wendell, *ante*, 268; Boyce *v.* Danz, 29 Mich., 146; Russell *v.* Miller, 26 id., 1; Case *v.* Case, 26 id., 484; Miller *v.* Thompson, 34 id., 10.

[2] As to where jurisdiction for one purpose will be retained for another, see Brown *v.* Gardner, Harr., Ch. 291; Whipple *v.* Farrar, 3 Mich., 436; Hawkins *v.* Clermont, 15 id., 511; Miller *v.* Stepper, 32 id., 194.

A. D. Fraser & T. Romeyn, for complainants, contended that the contract between the complainant and Sargeant was vitiated by the fraud of Sargeant in his assurances concerning the property. That misrepresentation or concealment in regard to material facts, entitles the injured party to have the transactions set aside, whether the party making the misrepresentation knew it to be false, or made his statements without knowing whether they were true or not, a person selling land being presumed to know the correctness of his representations. The title failing to part of the land, the whole sale will be rescinded.

Complainant is entitled to payment for his improvements, and is liable only for the actual rents and profits. Lapse of time is no bar to the relief sought, as the right to it does not arise completely until discovery.

H. N. Walker, and E. Farnsworth, Attorney General, for defendants.

There was no such fraud or misrepresentation on the part of Sargeant, as to the situation, extent, and value of the property, as would, if not excused, authorize this Court to annul the contract, and compel the defendants to refund the money already paid. It must appear not only that there were misrepresentations, but that the party was misled by them.

Complainant has waited too long. The condition of the property is so changed, that the parties cannot be replaced *in statu quo*. A party seeking to set aside a conveyance on the ground of fraud, must be prompt in communicating it, when discovered, and consistent in his notice to the opposite [*375] party of the use he intends to make of it. He *must not keep the property, to wait the chances of profit, and disavow the contract when it proves a bad bargain.

The Chancellor. On the 28th of July, 1836, Carroll purchased of Nehemiah O. Sargeant his interest in the village of Kent, at the Rapids of Grand River. Sargeant and Lucius Lyon were at that time joint proprietors of a large part of the village plat, and had made, and were then engaged in making

divers improvements, and were the owners of considerable personal property, connected with their village speculation, as materials for building, teams, and instruments for the construction of a canal then in part completed, and the like. They were also parties to various contracts for the sale of village lots, and the joint holders of bonds and mortgages, given for village property sold by them. Carroll was to take Sargeant's interest in the village speculation, to succeed to all his rights, and assume all his liabilities, and to pay Sargeant $83,000,—viz: $5,000 in cash, $18,000 by a draft at ninety days on the Phœnix Bank in the city of New York, and $60,000 in twelve annual installments of $5,000 each, with interest on each installment when paid. The necessary papers were executed, and possession was taken of the property by Carroll. Sargeant died in September, 1838, and defendant, Rice, was appointed administrator of his estate. In April, 1840, Carroll filed his bill in this Court against Rice, the administrator, Catharine C. Sargeant, the widow, and Lucius Lyon Sargeant, the only child, and heir at law, a minor under the age of twenty-one years, to have the sale of July twenty-eighth rescinded and the securities given for the purchase money delivered up and canceled, and to be repaid with interest what he had paid toward the purchase, on the ground of fraud in Sargeant, in misrepresenting the condition and *situation of the property at [*376] the time of the purchase; Carroll offering to account for all sales made by him.

The bill alleges, Sargeant misrepresented the property, in the following particulars, to induce complainant to purchase it.

First. The depth of the water in Grand River both above and below the Rapids, at which point the village of Kent is situated, and the facilities the river afforded for navigation.

Second. That the river did not overflow its banks at the village, in the time of freshet.

Third. The cost of completing the canal, which was in an unfinished state, and which, when completed as laid down on the village plat, was to extend from the head to the foot of the Rapids,

Fourth. The average head and fall of the water power that

would be created by the canal, which he represented to be twelve feet.

Fifth. The amount of moneys due on contracts, for village property sold.

Sixth. The effect of the delivering up of a contract to John P. Calder, executing to him a deed, and taking back a mortgage, which was done by Sargeant, had upon the interests or rights of complainant.

Seventh. The quantity of building materials that had been provided for building a mill and tavern house, the progress that had been made in framing, what is called by the witnesses, the mammoth mill, and that machinery for it, to a large amount, had been ordered and paid for.

Eighth. The interest he had in two islands in Grand River, to which he said he had a good title, and which were a part of the property purchased by Carroll.

Other misrepresentations are also alleged in the bill, relative to the property being unincumbered; relative to [*377] *steamboat stocks; to the building of steamboats to run to and from the village; to the location of a land office at the village by the United States government; to a mail contract, and the like.

The bill further states a failure of title to a saw-mill and water power, conveyed in connection with, and as appertaining to lot number one, on the Campau plat. It also charges a mistake in drawing the deed conveying the real estate, in describing the interest conveyed in lot number twenty-five, on what is called the lower fraction, to be an undivided half, instead of the whole of said lot.

It is seldom a case so complicated in its details, and in which so little regard has been had to common honesty and fair dealing, if we take complainant's bill to be true in all its parts, is presented to a court of equity for adjudication. It also strikes the mind as not a little singular, that complainant should have lain by nearly four years, before filing his bill. I can account for the delay only in this wise: Supposing he had made a good bargain, he was unwilling to relinquish it, on account of the

fraud, until the change in the times had stripped the property of its fictitious value, and turned what at first appeared to be a very good bargain, into a very hard one.

Fraud vitiates all contracts, at the election of the party injured; but he must make his election on the discovery of it, or within a reasonable time thereafter, whether he will rescind the contract, or consider it a good and subsisting contract, and seek redress for the injury he has sustained by an action on the case for the deceit. The injured party may pursue either course, on the discovery of the fraud, provided the property is in a situation to be restored to the vendor, in the condition it was in when he parted with it, or the change that has taken place, if any, has arisen from the use of the property, and is too slight of itself to *materially affect its value. [*378] If the change is so great that the parties cannot substantially be placed back where they were before the sale, the vendee must seek redress by an action on the case for his damages.

In *Boyce's Executors* v. *Grundy*, 3 Pet. R. 215, Mr. Justice Johnson, who delivered the opinion of the Court, says: "That a party is bound to be prompt in communicating the fraud when discovered, and consistent in his notice to the opposite party of the use he proposes to make of the discovery, cannot be questioned." And, in *Jones* v. *Disbrow*, the principle so clearly laid down by Mr. Justice Johnson was recognized in this Court, by Chancellor Farnsworth. Harr. Ch. R. 102. It is in itself so reasonable, the injured party, having two remedies, either of which he may pursue, but not both, and it so strongly commends itself to the common sense of every man, as to need no labored argument in its support. The difficulty, as is the case with most legal principles, consists in its application; and the circumstances of each case must furnish the Court with a key for that purpose.

In *Jones* v. *Disbrow*, but a few months had elapsed after the discovery of the fraud, before steps were taken to rescind the contract; and yet the Chancellor in that case said, Disbrow should at once, on the discovery of the fraud, have given notice

of his intention to recede from the contract. In the present case, assuming the several charges of fraud to be fully made out by the testimony, not only months, but years, were allowed to pass, after complainant was chargeable with notice of most, if not all the frauds of which he complains, before any steps were taken to rescind the contract. The first steps were to file his bill in this Court. This was the first notice defendants had of the alleged frauds, and of complainant's intention to [*379] rescind the contract. Sargeant did not die until *September, 1838;—two years and more after the sale;—and yet it does not appear Carroll ever complained to him of the sale of the property. On the contrary, as late as February, 1838, eighteen months after the sale, a payment of between five and six thousand dollars was made to Sargeant, on complainant's bond and mortgage for the $60,000.

When were the alleged frauds discovered? When came they to the knowledge of complainant, or his agents, (for notice to them, I hold, under the circumstances of the case, was notice to him,) who had charge of the property, and were carrying on improvements, and selling lots for him? The bill does not state. It appears from the testimony, however, that Almy & Richmond, Carroll's agents, were in Sargeant's employ at the time of the purchase, and had been for a long time previous. Almy was the engineer who drafted the village plat, a lithographic copy of which was exhibited to Carroll, showing the location of the property, and the proposed canal, and containing a statement of the water power, and the class of vessels that could navigate the river, both above and below the Rapids. Almy and Richmond were present at the different interviews between the parties, when they were bargaining for the property. They are the principal witnesses to the fraudulent representations made by Sargeant, and being, as they were, acquainted with the property, from their previous employment by Sargeant and Lucius Lyon, (Lyon being a joint proprietor with Sargeant,) in keeping their books, selling lots, and otherwise aiding and assisting the proprietors in building up their village, and, after the sale, continuing in the business as the

agents of Carroll, they must, from the very nature of their employment, have discovered in a very short time the falsity of Sargeant's representations, had they previously had no *knowledge on the subject. But Almy, at the time of [*380] the sale, as he states in his testimony, knew that the village plat on its face misrepresented the navigableness of the river, the depth of the water below the rapids, and the average head and fall of the water power to be created by the canal. He knew Sargeant's statement of the amount it would cost to finish the canal to be incorrect. Sargeant, he states, also knew it, and that nearly the whole of the unfinished part of the canal would be rock excavation, which did not appear from the surface of the ground. Of all the alleged misrepresentations, I consider those relating to the canal, the water power, and the navigableness of the river, the most important.

The other misrepresentations were of such a nature, that they could not be kept concealed from Almy and Richmond any great length of time. I refer to the inundation of a part of the village by freshets; the public highway passing diagonally through a number of blocks and injuring the lots, of which they must have known at the time; the amount of moneys due on the contracts assigned; the quantity of building materials; payments for machinery ordered for the mammoth mill; and the like.

Much was said on the argument about the Lyon mortgages. Almy had notice of them as early as the spring of 1838; which was two years before the bill was filed. Lyon, it appears, was at one time the sole proprietor of a part of the real estate, in which an undivided interest was conveyed by Sargeant to Carroll; and, while owning the whole interest, executed the mortgages referred to, and then sold an undivided half of the mortgaged premises to Sargeant. Lyon states in his testimony, the whole property mortgaged, including improvements, is worth from $60,000 to $65,000; and that the amount due on the mortgages is between $8,000 and $9,000. On a foreclosure *Lyon's half would be decreed to be first sold, [*381] and there can be no doubt it would bring enough to pay

the mortgages, without resorting to Carroll's half for that purpose. Still, it must be admitted, the mortgages would be likely to prevent that ready sale of lots, which Carroll must have had in view when he purchased. But Sargeant's statement extended only to his interest in the property; and the difficulty alluded to would have been experienced, more or less, had the mortgages been limited to Lyon's half only. In that case, the purchaser of a lot would have to take an undivided half of it subject to the mortgages, unless a release could be obtained from the mortgagee.

If Carroll, on discovering these mortgages, intended to make them a ground for rescinding the sale, he should have filed his bill immediately. By a change in the times, the property had greatly decreased in value during the four years he held on to the bargain, and he should not now be allowed to throw the loss on Sargeant's representatives, who would not have been benefited by an increased value. Moreover, the property cannot be restored in the condition it was in when the mortgages were discovered, much less when it was purchased by Carroll. For these reasons, I think the sale should not be set aside. But relief may be given to complainant in another way, under the general prayer of the bill. His damages, when ascertained, may, by a decree of the Court, be directed to be endorsed as so much paid, on his bond for the purchase money in the hands of the administrator.

Sargeant's estate is insolvent, unless the whole amount due on the bond is collected. If, then, complainant has sustained damages to a large amount, in consequence of the alleged frauds, (and he has adduced evidence to that effect, and it is my intention to send the question to a jury,) this Court can give [*382] more full relief than he can obtain *at law. Besides, two actions at law would be necessary;—an action on the case for the deceit,—and of covenant on the warranty, for the failure of title to the saw-mill and water power, conveyed with, and as part of lot number one, on the Campau plat:—and still leave the question of mistake, for it is nothing more, in the conveyance of lot twenty-three on the lower fraction, to

be settled in this Court, should the deed be construed to convey an undivided half only, instead of the whole lot.

I shall therefore direct a case to be made, and sent to the Circuit Court of Kent county for trial; putting in issue the several questions of fraud charged in the bill, and to assess complainant's damages on account thereof, with interest from the time of the purchase;—the location of the land office, and the high price of lumber, and the profits to be made from manufacturing it, to be left out of the case. Sargeant's statements in relation to them were nothing more than expressions of his opinion, and must have been so understood by complainant;—and there is no reason for believing they were not honestly entertained by him at the time. He had so much confidence the land office would be located at the Rapids, he went to the expense of fitting up buildings for the accommodation of the register and receiver. The office was to be located by the government; and complainant knew that fact. Sargeant had no power over it.

The case must also put in issue the failure of title to the saw-mill and water power, conveyed with lot number one on the Campau plat; and the jury, on finding this issue in favor of complainant, (who is to be plaintiff in the case,) must assess his damages, with interest from the time he was deprived of the mill and water power.

The question of mistake in the conveyance of lot *twenty-three, need not be submitted to the jury. That [*383] will be disposed of on the final hearing.

The case must be settled by a Master, if the parties cannot agree in making it up. Either party may notice it for trial: and either party on the trial may examine any witness whose testimony was read on the hearing, or read the deposition of such witness if he be dead. Either party may examine new witnesses and read the deposition of any witness of the opposite party that was read on the hearing; and the trial must be by a struck jury, if requested by either party.

[*384] *Charles Thayer *v.* Jason Swift *et al.*

It is the settled practice of this Court in an affidavit of merits, to require the party to state what such merits are.[1]

Where a party applies for leave to take testimony, after the time allowed by the rules has expired, he must state in his application what he expects to be able to prove by the witnesses he seeks leave to examine.

A complainant seeking to set aside the rules of the Court, will be compelled to make as strong a case, as a defendant to set aside a default.

Where complainant had allowed the time given by the rules of Court to take testimony to expire, without showing any excuse for neglect, except that his counsel were occupied with other business, the motion was denied.

Motion by complainant for leave to take testimony.

A replication was filed to defendant's answer, September 27th, 1843, but no order was entered for taking testimony, by either party, within the thirty days allowed by the fiftieth rule of the Court, after replication filed. Complainant states in his affidavit, that he has a good, just, and equitable claim, upon one or more of the defendants, and to the real estate mentioned and described in the bill of complaint, and alleged to have been conveyed by Jason Swift, one of the defendants, for the purpose of defrauding complainant, and other creditors. He also states the names of a number of witnesses, one of whom resides in Rochester, in the State of New York, all of whom, he swears, are material in support of his claim; and that he cannot safely proceed to a hearing on the merits, without the testimony of said witnesses, as he is informed by his counsel, and verily believes to be true. He further states, he made frequent application, to both his solicitor and counsel, to have his wit-

[1] An affidavit of merits should be made from affiant's knowledge of the facts and not from information and belief. Brown *v.* Cowee, 2 Doug., 432.

It should be made by the party himself, or a reason shown why not so made. Bank of Mich. *v.* Williams, Harr. Ch., 219.

As to affidavit of merits to set aside a default, see Stockton *v.* Williams, Harr. Ch., 241.

nesses examined; and was told *by them they could not [*385] attend to it, within the time allowed by the rules of Court, in consequence of other business they had to attend to. This last statement is also verified by the affidavits of the solicitor and counsel.

E. Farnswarth, Attorney General, in support of the motion.

R. S. Wilson, contra.

The Chancellor. A poor excuse is given for not entering the order to take testimony. Thirty days are allowed for that purpose, after the cause is at issue by a replication; and the parties have sixty days to examine their witnesses in, after the order has been entered, and notice given to the adverse party; and the time may be enlarged once, on an *ex parte* application, if made before the sixty days have expired, and as much oftener, by giving notice to the opposite party, as the justice and equity of the case may require. Instead of pursuing this course, complainant's solicitor adopted one to suit his own convenience; and concluded to disregard the rules of Court, and neglect examining his witnesses, until he has time to attend to it.

I do not think the excuse sufficient. He was not taken by surprise; he was not ignorant of the rules of Court; he has not availed himself of the first opportunity to make his motion; and complainant's affidavit does not disclose what he expects to prove by his witness, that the Court may judge of the materiality of the testimony, and the merits of the application. It is the settled practice of this Court, in an affidavit of merits, to require the party to state what such merits are. 8 Paige R. 136. This complainant has failed to do. He says he has a good and equitable claim, and that he cannot safely proceed to a hearing, without the testimony of the witnesses mentioned *in his affidavit, as he is advised by his counsel. [*386] He does not state what facts he expects to prove by them, that the court may judge of their materiality. It is the

established practice, on applications to set aside a default regularly entered, for not answering, to require defendant to exhibit the answer he proposes to file, or to state in his affidavit, fully, the merits of his defense; and, where complainant has neglected to take testimony within the time allowed by the rules of the Court, I see no reason why he should not be required to make as strong a case to set aside the rules of Court, as the defendant to set aside a default. Such has been the practice. I have so ruled in a number of cases, and see no reason for departing from it now. An affidavit of merits must disclose the facts, or what a party expects and believes he will be able to prove by his witnesses. *See Insurance Company* v. *Day*, 9 Paige R. 247.

Motion denied.

[*387] *William W. Dennis *v.* Needham Hemingway *et ux.*

No proceeding can be had on a bill for the foreclosure of a mortgage, if it appear that any judgment has been obtained on a suit at law for the money demanded by such bill, or any part thereof, unless, to an execution against the property of the defendant in such judgment, the sheriff shall have returned the execution unsatisfied, in whole or in part, and that defendant has no property to satisfy the execution except the mortgaged premises.[1]

To prevent proceedings on a foreclosure bill, it is not necessary that judgment shall have been rendered on the bond or note accompanying the mortgage, but for the money for which the mortgage was given.

Demurrer to a bill of foreclosure.

The bill sets forth a bond and mortgage of defendant and wife to complainant, dated June 3d, 1842, for $235.06, payable with interest, on or before the 15th day of November then next; and that the bond and mortgage were given to secure

[1] See Cooper *v.* Bressler, 9 Mich., 534.

the payment of $235.06 due complainant on a judgment recovered in favor of one Sullivan R. Kelsey, against said Needham Hemingway, in the Circuit Court for the county of Oakland, on the 29th day of November, 1841, of which judgment complainant was, and still is, the true and equitable owner. It did not appear from the bill that execution had been taken out on the judgment, and on that account the demurrer was interposed.

E. B. Harrington, in support of the demurrer.

Barstow & Lockwood, contra.

The Chancellor. The bond and mortgage were not taken in payment or satisfaction of the judgment, which is still in force, but as collateral security for its payment *merely. Their only effect was, to stay execution on [*388] the judgment, until the fifteenth day of November then next.

No proceedings can be had on a bill for the foreclosure of a mortgage, if it appear that any judgment has been obtained on a suit at law, for the money demanded by such bill, or any part thereof, unless to an execution against the property of the defendant in such judgment, the sheriff shall have returned the execution unsatisfied in whole or in part, and that defendant has no property to satisfy the execution, except the mortgaged premises. R. S. 377, § 109. The statute does not require the judgment should have been rendered on the bond or note accompanying the mortgage, but for the money for which the mortgage was given. The judgment is in the name of Kelsey, but complainant is the owner of it, and there is nothing to prevent his taking out execution in Kelsey's name, and collecting the money. Payment of the judgment to Kelsey, with a knowledge that it belongs to complainant, would not be a satisfaction of the judgment. As to construction of statute, see 4 Paige R. 549; 8 Paige R. 648; and 9 Paige R. 137.

Demurrer allowed, with leave to complainant to amend, on paying costs within twenty days.

[*389] *Edward Brooks *v.* Mead. Kellogg, and Hale.

This Court will take no notice of a parol agreement between the solicitors, relating to the proceedings in a cause, but require all agreements to conform to the 87th rule.[1]

Where complainant had failed to serve his replication on a defendant, but the latter attended and cross-examined witnesses, it was held to be a waiver of all objections to the replication.

Motion on the part of Hale to take from the files a replication to his answer, because it was not filed within the time allowed by the rules of the Court.

From the affidavits of defendant's solicitor, it appears he never had any knowledge or notice that any replication was, or had been filed, to the answer of Hale, until he was looking over the files in the register's office in January last, when he came across the replication. The affidavits used in opposing the motion state that a copy of the replication was not served on Hale's solicitor, in consequence of a parol agreement or understanding between the solicitors, that a copy need not be served. That testimony had been taken in the cause by complainants, and the defendants, Mead and Kellogg, and that the cause is on the calendar for a hearing. That notices of the taking of such testimony were served on Hale's solicitor, who attended and cross-examined the witnesses, and that Hale himself was present on one occasion; and that his solicitor had applied to the solicitors of the other parties, to assent to a commission for the examination of his witnesses.

E. C. Seaman, for Hale.

H. T. Backus, for complainant.

[*390] *The Chancellor. I can take no notice of the parol agreement between the solicitors, dispensing with ser-

[1] See Suydam *v.* Dequindre, *ante*, 23.

vice of a copy of the replication. The 87th rule requires every agreement, in respect to the proceedings in a cause, to be reduced to the form of an order by consent, and entered in the book of common orders, or to be in writing, and signed by the party against whom it is alleged.

By attending and cross-examining the witnesses, defendant waived all objections to the replication. 1 Hoff. Ch. Pr. 452. His application to the solicitors of the other parties, to assent to a commission for the examination of his witnesses, shows his understanding of the state of the pleadings. If there were no replication to his answer, he could examine no witnesses. Where, by mistake, a replication has not been filed, and yet witnesses have been examined, the Court will permit a replication to be filed *nunc pro tunc*. Mitf. Pl. 323; 1 Smith Pr. 336.

Motion denied.

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*Jacob M. Howard and Noah Sutton *v.* Thomas Palmer. [*391]

The examination of a defendant to a judgment creditor's bill, under an order entered in pursuance of the 111th rule [105 of the new rules] is not confined to defendant's property or effects, but extends to any matter which he would be required to disclose by answer; and authorizes the examination of witnesses on any matter charged in the bill, and not admitted by defendant on his examination before the Master.

Where a special motion was made for an order for a receiver under a judgment creditor's bill, and defendant had notice, but failed to appear or oppose the motion, *it was held*, that the fact of a demurrer having been filed was no objection to granting the order in such case, and that the defendant, if he meant to insist upon it, should have interposed his objection on the hearing of the motion, that the Court might look into the case and decide whether it was well taken.

The service of a copy of a Master's summons, without showing the original, is bad.

Irregularity in the appointment of a receiver under a judgment creditor's bill is no ground for defendant's objecting to submit to an examination concerning his property and effects.

An order in part erroneous is not void, so far as relates to matters properly contained in it.

Judgment creditor's bill.

A motion was made for an attachment against defendant, for not appearing before a Master to make an assignment of his property to receiver, and submit to an examination on oath relative to it. The motion was opposed, on the ground that the appointment of the receiver by the Master was irregular, as was also the order for his appointment, and for defendant to assign and deliver over his property to him; as there was a demurrer pending, when the order was granted. And further, that the order required defendant to submit to such examination as the Master should direct, in relation to any matter the defendant would be required to disclose by answer to [*392] the bill *of complaint, the bill not having been taken as confessed under the 111th rule of Court.

J. S. Abbott and J. M. Howard, in support of the motion.

H. H. Emmons, contra.

The Chancellor. The order under the 111th rule, for the appointment of a receiver, on a judgment creditor's bill, differs materially from the common order entered in this class of cases, where the bill has not been taken as confessed under that rule. The examinaton before a Master, under an order entered in pursuance of the rule, is intended to answer the double purpose of ascertaining what property the defendant has to assign and deliver over to the receiver, and of an answer to the bill of complaint. Hence, the examination is not limited to defendant's property or effects, as is the case under the common order; but extends to any matter defendant would be required to disclose by answer to the bill, and authorizes the examination of witnesses, on any matter charged in the bill, and not admitted by

defendant, on his examination before the Master. *Browning* v. *Bettis*, 8 Paige R. 568.

The order for a receiver was granted on a special motion, of which notice was given to defendant's solicitor, who did not appear to oppose it. The demurrer was no objection to granting the order; and if defendant intended to insist on it as a reason why a receiver should not then be appointed, he should have appeared, and opposed the motion on that ground; and the Court would have looked into the pleadings to see whether the demurrer was well taken, or not, and, if it had any doubt on the question, would have ordered the motion to stand over until the demurrer was disposed of.

*Complainants, however, erred in entering their order. [*393] Instead of the common order, they entered the special order authorized by the 111th rule, where a defendant to get rid of filing an answer, gives a written consent that the bill may be taken as confessed, and a receiver appointed. The error appears on the face of the order, which shows it was granted on special motion, and notice to defendant, and not by consent of parties.

A motion made in this same case, on the first day of term, for an attachment against defendant, was denied, on the ground that the Master's summons was not shown to defendant, when he was served with a copy of it, and that he was not, therefore, bound to obey it. The Master, notwithstanding defendant paid no attention to his summons, and did not so much as appear before him, went on, and appointed a receiver. This was irregular, as the Master's summons had not been properly served; and the appointment of the receiver would, on that account, be set aside on defendant's motion. But this irregularity in the appointment of a receiver, is no answer to the present motion. Defendant should have made a motion to have the appointment set aside, and obtained an order staying proceedings, in the meantime, before the Master. He should, also, have taken this course, if he wished to have the objectionable parts of the order for a receiver stricken out. The order is not void. 3 Paige R. 195 253; 5 Paige R. 166. It is

erroneous, only so far as it requires defendant to answer under oath any matter he was bound to disclose by answer to the bill. If defendant wished to avoid the trouble and expense of a motion to correct the order, he should have appeared before the Master, and objected to that part of it which is improper, and refused to be examined under it, except as to the [*394] *property and effects he was required to assign and deliver over to the receiver.

Under the circumstances, I shall grant the motion for an attachment, unless defendant, within two days, waives all irregularity in the appointment of the receiver, in which case the motion is to be denied, with leave to complainants to amend their order for the appointment of a receiver.

Samuel Barstow *v.* Hiram Smith and Hannah his wife, Arza Lewis and Mary his wife, and Elisha Thornton and Aurilla K. his wife.

The Court must judge of the intent of the legislature, from the language used to express that intent; and where the language is clear and explicit, and susceptible of but one meaning, and there is nothing incongruous in the act, the Court is bound to suppose the legislature intended what their language imports.[1]

Where the certificate of the acknowledgment of *femes covert* to a mortgage subsequent to the act of 1840, declared that they executed it without fear or compulsion *of their husbands, it was held*, that such certificate was no evidence, either in law or equity, of such an acknowledgment by them as the act of 1840 requires, to bar their right of power.

A demurrer may be good as to one defendant, and bad as to other defendants.[2]

It is a good ground of demurrer to the whole bill that one of the complainants has no interest in the suit, and has improperly joined with others in filing the bill; but there is no such rule in regard to defendants.

[1] See Bidwell *v.* Whittaker, 1 Mich., 469; Leoni *v.* Taylor, 20 id., 148.

[2] Williams *v.* Hubbard, *ante*, 28.

Bill to foreclose a mortgage.

The bill, after setting forth the mortgage, stated the execution of it was acknowledged in due form of law before Andrew Dorsey, a justice of the peace of Calhoun county, by all of the defendants; and that "the said Mary, Hannah, and Aurilla K. being examined by said *justice separate and [*395] apart from their husbands, acknowledged that they had executed said indenture of mortgage without any fear or compulsion of *their said husbands*, as in and by the certificate of the acknowledgment thereof, endorsed on said indenture of mortgage, and signed by said justice, will more fully appear." The defendants put in a joint demurrer, on the ground the justice's certificate of the acknowledgment of the execution of the mortgage, by Mary, Hannah, and Aurilla K., was insufficient to bar their inchoate right of dower in the mortgaged premises, under the fourth section of the act relating to the conveyance of real estate, (*Session Laws*, 1840, *p.* 167,) which section is in these words: "That the rights of dower which any *feme covert* may have to any lands in the State of Michigan, shall not be passed or conveyed only by deed executed by such *feme covert*, and acknowledged by such *feme covert*, on a private examination, separate and apart from her husband, that she executed the deed without fear or compulsion *from any one;* which acknowledgment shall be certified upon such deed by the officer before whom it may be made."

T. Romeyn, in support of the demurrer.

S. Barstow, contra.

The Chancellor. To bar the wife's right of dower, the revised statutes required she should acknowledge, apart from her husband, that she executed the deed without any fear or compulsion of her husband. *R. S. p.* 263, § 7. This was done in the present case, and it is insisted the fourth section of the act of 1840, although its phraseology differs somewhat from the revised statutes, was not intended to change the long and well established rule of law on this subject. The Court must

[*396] judge of the intent *of the legislature from the language used to express that intent; and where the language is clear and explicit, and susceptible of but one meaning, and there is nothing incongruous in the act, the Court is bound to suppose the legislature intended what their language imports. The act of 1840 requires a *feme covert* to acknowledge, on a private examination, separate and apart from her husband, that she executed the deed without fear or compulsion *from any one;* not without fear or compulsion of her husband, but from any one,—her husband, or any other person. It supposes she might be impelled, through fear or compulsion of some one else than her husband, to execute a deed parting with her rights. There is nothing improbable in such a supposition. If a husband can be guilty of such cruelty towards one whom he is bound to cherish and protect, it is not difficult for the mind to conceive a relative of the wife, or a stranger, in a situation to operate upon her timidity, and to influence her acts by terror or fear, which the law guards against as well as force. It is immaterial from what quarter it proceeds, whether from her husband or a third person, if she is driven by it to do what she otherwise would not have done. Something of this kind must have led to the new enactment, and the difference in the phraseology of the two laws. The fourth section of the act of 1840, was a work of supererogation, on the part of the legislature, if there was no intention at the time to change the then existing law. I am, therefore, although it may affect many titles, constrained to declare that the justice's certificate is not evidence, either at law or in this Court, of such an acknowledgment by the defendants Hannah, Mary, and Aurilla K. of the execution of the mortgage by them, as the act of 1840 requires to bar their right of dower in the mortgaged premises, should they survive their husbands.

[*397] *Whether the Court could give relief in such a case, if the defective certificate were the result of accident, or mistake in the justice, in not propounding the proper question, or in drawing up the certificate, it is not my intention at this time to decide. To enable complainant to bring this question before

the Court, if he should think proper to do so, I shall allow the demurrer as to the defendants Hannah, Mary, and Aurilla K., with leave to complainant to amend his bill; and overrule it as to the other defendants. Neither party to have costs.

A demurrer may be good as to one defendant, and bad as to other defendants. Coop. Eq. Pl. 113; 8 Ves. R. 403, 404. The rule that it cannot be good in part and bad in part, and therefore is bad as to the whole, applies to different parts of the bill covered by the demurrer, and not to different defendants who have united in the demurrer, as to one or more of whom it may be good, and bad as to others. It is a good ground of demurrer to the whole bill that one of the complainants has no interest in the suit, and has improperly joined with others in filing the bill; 3 Paige R. 336; 4 Russ. R. 225; but there is no such rule in regard to defendants. These remarks are made in answer to what was said on the argument, that the demurrer, if good for a part of the defendants, must be allowed as to all of them.

Demurrer allowed as to defendants Hannah, Mary, and Aurilla K., but without costs, and overruled as to other defendants.

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*The President, Directors and Company of [*398] the Bank of Michigan *v.* Johnson Niles.

It is usual on allowing a demurrer for any cause which the Court sees, on the argument, may be obviated by amending the bill, to give leave to amend on paying the costs of the demurrer. But where the Court on the argument cannot see from the facts before it, how the objection on which the demurrer was sustained could be removed, it is necessary[1] for the complainant to apply for leave to amend, by petition setting forth the additional facts sought to be incorporated in the bill.[1]

[1]An amendment of the bill is not allowed as of course after replication and testimony; but a special application for leave to amend is necessary. Hammond *v.* Place, Harr. Ch. 438.

It is discretionary with the Court to allow the bill to be amended and

The Supreme Court has no original equity jurisdiction and cannot act upon any facts which do not constitute a part of a case appealed from, and leave to amend can only be granted by the Court where the cause originated.[1]

Where a petition was presented for leave to amend a bill, by inserting additional facts, after a decree sustaining a demurrer to the bill had been affirmed by the Supreme Court, on the same reasons which had governed this Court, *it was held*, that the application came too late.

A complainant wishing to amend his bill, must take the first opportunity after being made acquainted with the defects in it, to ask leave to do so.

Complainants filed their bill in this Court for the specific performance of a contract for the sale of real estate, to which the defendant demurred; and the demurrer being allowed, (*vide ante* 99,) complainants appealed to the Supreme Court, where the order of this Court allowing the demurrer was affirmed; and on the case being remitted for further proceedings, they presented their petition for leave to amend.

J. F. Joy, for complainants.

A. D. Fraser, for defendant.

The Chancellor. It is usual, on allowing a demurrer, for any cause, which the Court sees, on the argument, may be [*399] obviated by amending the bill, to give leave to *amend, on paying the costs of a demurrer. The proposed amendment is not one of this character. The Court could not see, on the argument of the demurrer, from the facts then before it, how the objection on which the demurrer was sustained could be removed. Hence the necessity of complainants' founding their application on a petition, stating the additional facts they wish to incorporate in their bill. Had they presen-

the cause opened for proofs after it has been set down for hearing on bill, answer and replication. Briggs *v.* Briggs, 20 Mich., 34.

As to amendments at the hearing, see Gorham *v.* Wing, 10 Mich., 486; Babcock *v.* Twist, 19 id., 516; Goodenow *v.* Curtis, 18 id., 298.

[1] See Sears *v.* Schwarz, 1 Doug., 504; House *v.* Dexter, 9 Mich., 246; Palmer *v.* Rich, 12 id., 414, amendment after reversal of decree by the Supreme Court for want of parties; Moran *v.* Palmer, 13 id., 367.

ted their petition on the allowance of the demurrer, I should have permitted them to amend. They do not ask to change the substance of their case, which would be inadmissible, but to make certain facts, out of which the contract between them and defendant originated, a part of their bill, for the purpose of showing that defendant and one Turner had made a contract with Pierson for the purchase of the Rochester mill property, and that Turner had assigned his interest in that contract to them, in payment of a debt, previous to their contract with defendant; and, that the $5,000 they were to pay Pierson, mentioned in their contract with defendant, was a balance due Pierson on his contract with defendant and Turner. But it is insisted that this Court, the order allowing the demurrer having been affirmed by the Supreme Court, has not now the power to allow the amendment; and that complainants should have made their application to the Supreme Court, for leave to amend, instead of making it to this Court, or that they should have obtained leave of that Court to make the motion here.

Any person who may think himself aggrieved by the decree or final order of this Court, (R. S. 379, § 121,) may appeal therefrom to the Supreme Court; which may reverse, affirm, or alter such order or decree, and make such other order or decree therein, as justice or equity shall require. R. S. 380, § 125. The Supreme Court has no original equity jurisdiction. In matters of equity it has *appellate powers only. It may [*400] affirm, reverse, or modify the final order or decree appealed from, upon the pleadings and proofs on which the cause was heard and determined in this Court. But no new facts in the cause can be elicited in that Court as the basis of its action, without making it a Court of original jurisdiction, as well as a Court of appellate jurisdiction; so far, at least, as the new facts are concerned, and have a bearing on the decree appealed from, or the practice of this Court. The appellate Court could not have entertained the present application, and granted the prayer of the pititioners, without acting in a matter that had not been before this Court, and from which, consequently, no appeal had been taken. The case of *Filkins* v. *Hill*, 4 Bro.

P. C. 640, is no authority for the exercise of this power by the appellate Court. In that case the Chancellor's decree awarding a feigned issue was reversed, with leave to complainant to amend his bill, because the fact, to ascertain which the issue had been directed, was not put in issue by the pleadings; and the appellate Court, on reversing the order of the Chancellor, made such order as the Chancellor himself should have made from the facts before him. The appellate Court acted on the same facts that the Chancellor had acted on, and not on any new facts introduced into the case after the appeal had been taken.

Neither is the case of *Murray* v. *Coster*, 20 J. R. 576, as I view it, any authority for such power in the appellate Court. That was an appeal from an order overruling a plea of the statute of limitations. The Chancellor overruled the plea, because the case made by the bill was a case of trust, to which the statute of limitations could not be pleaded. The defendant appealed, and the order overruling the plea was affirmed; but for a different reason from that assigned by the Chancellor. The appellate [*401] *Court decided the case made by the bill was not a trust, that the statute of limitations was a good plea, but that the answer accompanying the plea showed such an acknowledgment of the debt, as took it out of the statute. Thereupon a motion was made to send back the cause to the Chancellor, with directions to allow appellant to amend his answer; which was denied, on the ground that an amendment to the answer could affect nothing. It was not, therefore, necessary in that case for the appellate Court to decide on its power to give the directions asked. Ch. J. Spencer, whose opinion, throughout the case in the Court of Errors, prevailed, doubted the power of the Court to give the directions. He spoke of the case of *Filkins* v. *Hill*, as no authority for the application. He said it was "a novel application to a court of appeals," and "if the Court had the power, he should not be for exercising it."

In *Brown* v. *Idley*, 6 Paige R. 46, a decretal order of the Vice Chancellor, awarding a feigned issue to determine the validity of a will, was appealed from to the Chancellor, who

affirmed the decree; and an appeal was then taken to the Court of Errors, where the decree was also affirmed. The cause being remitted to the Vice Chancellor, he allowed complainant to amend the bill by striking out the name of an infant complainant. From this last order an appeal was taken to the Chancellor, who reversed the order of the Vice Chancellor, on the ground that the amendment was not a mere matter of form, and that, after the cause had been heard on the pleadings and proofs, no other than mere formal amendments should be allowed; and those under special circumstances. He speaks of the decree of the Vice Chancellor having been affirmed by the Court of dernier resort, without any authority reserved to open or modify it. But I look upon this as an additional reason to what he had before stated, why the amendment *should not have been allowed, and not as a sufficient [*402] reason, of itself, for refusing the amendment. It does not appear to have been insisted on in opposing the amendment, either before the Chancellor or Vice Chancellor.

In *McElwain* v. *Willis and others*, 3 Paige R. 505, which was an appeal to the Chancellor, from the decision of the Vice Chancellor, allowing the several demurrers of Willis and Yardley, two of the defendants to a judgment creditor's bill, the decision of the Vice Chancellor as to Yardley's demurrer was affirmed, with leave to the complainant to apply to the Vice Chancellor to amend his bill. In this case, the demurrer was to a matter of form merely, and leave to amend had been asked on the argument of the demurrer before the Vice Chancellor, and should have been granted by him.

In *Jackson* v. *Ashton*, 10 Pet. R. 480, which was an appeal from the Circuit Court of the United States for the eastern district of Pennsylvania, the decree of the Circuit Court had been reversed by the Supreme Court, for want of jurisdiction,—the citizenship of one of the parties not appearing on the record. A motion was afterwards made in the Supreme Court to amend, which was denied. The Court say, however, "we entertain no doubt, that, notwithstanding anything in the former decree of reversal, it is entirely competent for the Circuit Court, in their

discretion, to allow the amendment now proposed to be made, and to reinstate the cause in that Court.

But the opinion of the Supreme Court affirming the order of this Court allowing the demurrer, it is contended, is the law of the case. It is no more the law of the case than the decision of this Court was the law of the case, in this Court, before it was affirmed. Of what case is the decision of the Supreme Court the law? Of the case upon the record, and of no [*403] other case; and this Court is *not asked to review that case, and reverse both its own decision and the decision of the Supreme Court, (for it could not do one without the other,) but to allow complainants to make a new case;—a case that has not been decided by either Court. There is no analogy between the present application and the case of *Gelston* v. *Codwise*, 1 J. C. R. 189. In that case there was an attempt made to litigate rights that had previously been decided on their merits by the appellate Court.

I am therefore of opinion the complainants have properly presented their petition to this Court; and the only question is whether they have not come too late with their application. I think they have. They should have presented their petition before they appealed, and made their case as perfect as it could be made before going to the appellate Court. The reasons for sustaining the demurrer were stated by the Court, when the demurrer was allowed; the complainants were aware of them, and the decision of this Court has been affirmed by the appellate Court, on the grounds taken by this Court. The present is not the first opportunity complainants have had to ask leave to obviate the objections raised to the bill by the demurrer. If it were, the case would be altogether different. If the decretal order of this Court had been affirmed for different reasons than those assigned by this Court, and the latter had been held invalid by the appellate Court, the complainants would stand on different ground from what they do. They could then say this was the first opportunity they had had, after being made acquainted with the defects in their bill, to ask leave to amend. Such an application would come with much force. But to

grant the present application, under the circumstances, would be carrying the doctrine of amendments much further than any case has yet carried it, and encouraging appeals where they *are not necessary to the ends of justice. I know [*404] of no case that has gone this length, and I have been referred to none.

The solicitor's ignorance of the facts stated in the petition, until after the appeal had been taken, cannot place the complainants in a better position than they would have been in had they not appealed. The case was argued in this Court some months before it was decided, when the solicitor was made acquainted with the objections to the bill, and he should then have inquired of his clients whether they could be obviated in case the demurrer was sustained.

Motion denied.

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*Sarah B. Chipman, a minor, by Harris [*405] Newton, her next friend, *v.* Thaddeus Thompson, Samuel F. Chipman *et al.*

A court of equity may relieve against the breach of a condition precedent in the nature of a penalty; and there is no good reason why it should not relieve against the breach of a condition precedent, when it would against a condition subsequent.[1]

The substantial difference which governs courts of equity, in cases of conditions, is not whether the condition be precedent or subsequent, but whether a compensation can, or cannot be made.

The Court is not bound, in all cases where a compensation can be made, to give relief; for the party seeking relief may have so conducted himself as to have lost all claim to its interposition; but when this is not the case, and it is equitable under the circumstances that relief should be given, it is competent for the Court to give it.

[1] To the point that equity will not lend its aid to enforce a penalty or forfeiture, see Crane *v.* Dwyer, 9 Mich., 350; White *v.* Port Huron & Milwaukee R'w'y Co., 13 id., 356; Wing *v.* Railey, 14 id., 83; Fitzhugh *v.* Maxwell, 34 id., 138.

Chipman *v.* Thompson.

A bill, filed and sworn to by a person who is deceased, is evidence against his heirs to prove what might be proved by his declarations.[1]

In a suit respecting lands, where defendants were described in the bill as heirs of the father, when in fact they claimed as heirs of their mother, *it was held*, that they were properly made parties, as claiming an interest in the property in controversy; and that, if they wished to take the objection that their interest was not properly made to appear in the bill, they should have demurred; and that it was too late to raise it on the hearing, after proofs had been taken, and it appeared to the Court that the proper parties were before it.

Cyrus Chipman, in his lifetime, being the owner of some personal property, and seized in right of his wife, Anna Chipman, of a farm of ninety acres in Avon, Oakland county, and being desirous of providing for the support of himself and wife during their lives, and for the education and support of Anna F. Chipman, a minor daughter, during her minority, on the 12th day of February, 1834, entered into the following agreement with his son, George A. Chipman:

"This agreement made and entered into this 12th day of February, A. D. one thousand eight hundred and [*406] *thirty-four, by and between Cyrus Chipman, of Oakland, in the county of Oakland, and the territory of Michigan, of the one part, and George A. Chipman, of the the same place, of the other part, witnesseth: That the said Cyrus Chipman, in consideration of the agreements on the part of the said George A. Chipman, hereinafter mentioned, doth by these presents lease and to farm 'let unto the said George A. Chipman, and to his heirs, the farm on which the said Cyrus Chipman now lives, in the township of Oakland aforesaid, for and during the natural lives of the said Cyrus Chipman and Anna Chipman, wife of the said Cyrus; and the said Cyrus Chipman doth hereby convey to the said George A. Chipman and his heirs all the personal property now owned by him, excepting the household furniture, which is to be equally divided between the said George A. Chipman and Anna F. Chipman, or their heirs. In consideration of which, the said George A. Chipman agrees, for himself, his heirs, executors and adminis-

[1] See Wilson *v.* Wilson, 6 Mich., 9; Jones *v.* Tyler, id., 364.

trators, to support, clothe, victual and lodge the said Cyrus Chipman and Anna Chipman during their natural lives, and furnish them with all necessary medicines and medical attendance in sickness, and all other attendance necessary in their old age, and in all respects conduct himself towards the said Cyrus Chipman and Anna Chipman as a son ought to conduct himself towards his parents; and in case the said Cyrus and Anna, or either of them, shall at any time desire to reside at any other place than with the said George A. Chipman, they are to have that privilege, and the said George A. Chipman's liability to support them is to continue the same.

"And, whereas, a deed of the aforesaid farm has this day been made out and executed, and placed in the hands of Thaddeus Thompson, of the township of Troy, in the county of Oakland aforesaid; now, if the said George A. *Chip- [*407] man shall well and truly perform on his part all the conditions of this agreement, the said deed, on the death of the said Cyrus Chipman and Anna Chipman, is to be delivered to the said George A. Chipman, his heirs, executors or administrators; but in case the said George A. shall fail to perform the said conditions, the said deed is not to be delivered to him, but the land therein specified to be and remain in the said Anna Chipman, the same as though the said deed had not been executed. And the said George A. Chipman further agrees to support Anna F. Chipman, during any sickness with which she may be visited, until she is of the age of one and twenty, provided she does not sooner get married, and also give the said Anna F. Chipman a good common education, and clothe her during her minority."

A deed of the farm was made out, executed and acknowledged in due form of law by Cyrus and Anna, and delivered to Thompson to be delivered by him in pursuance of the agreement. Cyrus and Anna afterwards resided on the farm with George, who it is admitted, during his lifetime, in all respects fulfilled the agreement. Anna died in January, 1837, and George in September of the same year, leaving Eliza Ann Chipman, his widow, and the complainant, Sarah B. Chipman,

his only child and heir at law. Cyrus, after the death of George continued to reside on the farm, with George's widow and child, as he had done in George's lifetime. On the 9th day of June, 1839, the widow intermarried with Harris Newton, who went to reside on the farm with her, and, soon after, was appointed guardian to complainant. Cyrus, becoming dissatisfied with Newton's conduct, on the 26th day of July following went to reside with Samuel F. Chipman, another son of his, with whom he continued until his death in October, 1840. New-
[*408] ton, during this time, paid but fifteen *dollars towards supporting him. Bills for board and the like were presented for payment, which he neglected or refused to pay, on the ground they were extravagant, but alleged a willingness to pay what was right. After the death of Cyrus, in consequence of the unwillingness of the heirs, Thompson refused to deliver up the deed, and Samuel F. Chipman commenced an action of ejectment against Newton, to recover possession of the farm. Thereupon complainant filed her bill against Thompson and the heirs, praying a delivery of the deed to her, on her paying what was justly due for the support and maintenance of Cyrus Chipman, after he left the residence of her guardian, and for an injunction against the proceedings at law to recover possession of the farm.

O. D. Richardson and *W. Draper*, for complainant.

H. Chipman, for defendants.

The Chancellor. The relief asked is opposed principally on three grounds: *First.* That the agreement between the father and son, was to be executed by the latter in person, and, on his death, became inoperative and void. *Second.* That it is not binding on the heirs of Anna Chipman, and should not be enforced against them. *Third.* That it has not been performed, and a Court of Equity will not relieve against a condition precedent.

First. I see nothing in the agreement to warrant a conclusion that George was to have an estate of inheritance only in

case he survived his parents. No such condition is annexed to the delivery of the deed by Thompson, who, after the death of the parents, in case George performed on his part, was to deliver it to him, "his heirs, executors, or administrators." Why were George's representatives mentioned, if he only was to receive the deed, and perform *the conditions on [*409] which it was to be delivered. They were bound, as well as George, for the support of the old people. But why were they so bound, if the agreement was to be at an end in the case George did not survive his parents? The language of the agreement is, "now, if the said George A. Chipman shall well and truly perform on his part all the conditions of this agreement, the said deed, on the death of the said Cyrus Chipman and Anna Chipman, is to be delivered to the said George A. Chipman, his heirs, executors, or administrators." Although a performance by George, and not by his representatives, is here mentioned, yet a performance by them is not excluded. On the contrary, it is clearly to be implied, from the fact that George had before bound them in express terms; and the agreement provides for the delivery of the deed to "his heirs, executors, or administrators," as well as himself. If they had been left out by design, where George's name first occurs in this part of the agreement, they would, undoubtedly, have been omitted two or three lines lower down, where both he and they are mentioned in connection with the delivery of the deed.

It is said that part of the agreement which required George to conduct himself towards his father and mother as a son ought to conduct himself towards his parents, is an essential part of the agreement, and of the condition on which the deed was to be delivered to Thompson. This is true. The father not only had a right to expect from his son kinder treatment in his old age than from a stranger, but actually made it a part of the condition on which the deed vesting in him an estate of inheritance in the farm, was to be delivered. But no sufficient argument can be drawn from this circumstance, to warrant a different construction of the agreement from the one

already given. It is conceded that George in his life-
[*410] time lived up *to the agreement in every particular. His death before his parents was probably looked upon, when the agreement was entered into, as an event by no means likely to occur; yet it was foreseen the old people might, from some cause or other, wish to change their residence and live with some one else; and George's liability for their support was expressly provided for in that event. Nothing could show more clearly than this, that the personal care and attention of George, though one of the inducements that led to the agreement, was by no means the only or principal inducement.

Second. That the agreement is not binding on the heirs of Anna Chipman, and should not be enforced against them. Complainant does not seek the specific performance of a contract, made with Anna and her husband, for the purchase of the farm. If she did, it might well be asked whether such contract, as to Anna, was not void or voidable, and whether this Court would decree a specific performance of it against her heirs. The bill asks nothing of the kind; but, on the contrary, that the deed executed and acknowledged by Anna as well as her husband, so as to pass her estate, may be delivered to complainant as the heir at law of the grantee. The deed was delivered to Thompson as an escrow, to be delivered by him to George, on his performing his agreement with his father. Now, can there be any doubt it was competent for the father, in his lifetime, to have released George from the performance of the agreement, or to have consented to an absolute delivery of the deed? I think not. The performance of the agreement on the part of George was a condition precedent, and, like any other condition precedent might have been released. Neither Anna in her liftime, nor her heirs after her death, could have objected, for she was not a party to the agreement.
[*411] The *only interest her heirs had after her death, in the agreement, was a contingent right to the estate of their mother in the farm, if the deed was not absolutely delivered with the consent of the father in his lifetime, or the agreement performed on which it was to be delivered after his death,

or so far performed that a court of equity would compel a delivery of it against his personal representatives. This brings us to the next and last objection.

Third. That the agreement has not been performed, and a court of inquiry will not relieve against a condition precedent. The agreement does not appear to have been strictly kept by Newton, the guardian, after Cyrus went to live with his son Samuel. Up to this time there is no complaint. After George's death, Cyrus continued to live on the farm with his daughter-in-law, until she married Newton, as he had done before, but, soon after the marriage, he became dissatisfied, and went to live with Samuel.

A court of equity may relieve against the breach of a condition precedent, in the nature of a penalty. *Wallis* v. *Crimes*, 1 Ch. Ca. 89. Mr. Cruise says: "The substantial difference which governs courts of equity in cases of conditions, is not whether the condition be precedent or subsequent, but whether a compensation can, or cannot be made." 2 Cruise Dig. 40. The Court is not bound in all cases, where a compensation can be made, to give relief. The party asking relief may have so conducted himself as to have lost all claim to its interposition. He may have absolutely refused to perform the contract, or he may have renounced all rights under it. But, when this is not the case, and it is equitable under the circumstances that relief should be given, it is competent for the Court to give it. A circumstance that will always have great weight with the Court is, that the condition has been *in part per- [*412] formed; that the party has done in part what he was bound to do to entitle him to what he asks, and stands ready to make good the deficiency. In *Radcliff* v. *Warrington*, 12 Ves. R. 326, a specific performance of a contract for the sale of an annuity was decreed in favor of a vendor, who had lost his remedy at law on the contract by his own default, and who would have lost nothing, had relief been refused, except the money deposited on the sale by the vendee. There is no good reason why the Court should not relieve against the breach

of a condition precedent, where it would against a condition subsequent.

George was to have, for supporting his parents, the personal property and a lease of the farm for three lives, and after their deaths an estate of inheritance in the farm, if he lived up to the agreement. The inheritance was as much a part of the consideration he was to receive, as the personal property or lease; only, instead of being given absolutely, it was made to depend on the performance of the agreement on his part. The condition is in the nature of a penalty, inserted in the agreement to secure a more faithful execution of it.

Anna Chipman received her support for her lifetime, and Cyrus Chipman his for nearly five years and a half; when he went to live with his son Samuel. After Newton's marriage with the widow, he took charge of the property, and went on to manage it as his own; which appears to have given dissatisfaction to the old gentleman, and was his reason for going to live with Samuel. It was not on account of any harsh or improper treatment; for after he had left, he admitted he had been well treated, and that he could not have been better treated by his own children. Newton did not refuse to provide for him. We find him at one time paying fifteen dollars,—at another [*413] *offering to pay Samuel thirty dollars, to apply on his board,—at another making arrangements with a merchant to let him have cloth for a coat and overcoat,—and then paying some thirty dollars towards his doctor's bill.

I am satisfied from the testimony there was a strong desire, if not a determination, on the part of the old gentleman and and Samuel, soon after the former went to live with the latter, to put Newton in fault if possible, and an end to that part of the agreement relating to the deed. The bill of August 21st, 1839, for four weeks' board, &c., presented to Newton for payment, shows pretty clearly to my mind a determination to make him either pay unreasonable charges, or refuse payment altogether. The latter was probably the object, and, to obtain evidence of the fact, the reason why the bill was presented by the witness Luce, and not by Samuel himself. The one hun-

dred dollars demanded by Samuel for his father to go to the State of New York, where he had spent the preceding winter, and the old gentleman's objections to the cloth, that it was not fine enough, when he called at the store to see it, are additional circumstances from which the intention of the parties may fairly be inferred. But we need not rely on these, for we have the positive testimony of Cyrus A. Chipman, one of the sons, on this point. He says Newton offered to furnish articles that his father wanted; but his father said he would not receive anything from him, for he could not fulfill the contract;—that he Newton, had no business there;—referring to the possession of the farm.

Complainant is entitled to the deed, on paying what is due for the maintenance of her grandfather, after he went to reside with Samuel.

A question of evidence, and a preliminary objection made on the part of defendants, must not be passed over unnoticed.

*The bill filed by Cyrus in his lifetime against New-[*414] ton, and subscribed and sworn to by him, to obtain an injunction, is admissible as evidence for complainant, to prove what may be proved by the declarations of Cyrus; but for no other purpose. There can be no doubt on this point, when the bill is verified by the oath of the party, whatever may be the rule of law when it is not so verified.

It was insisted on the argument that no relief could be given in the present suit against defendants as the heirs of Anna Chipman, because they are not named as her heirs in the bill, but as heirs of Cyrus Chipman. The case made by the bill is against the heirs of Anna Chipman. The fee was in her, and not in her husband, who never had anything more than a life estate. Defendants do not deny they are her heirs, nor that whatever interest they have, they derive through her. On the contrary, they insist, as her heirs, no relief can be had against them, not only in the present suit, but in any suit; and, failing in this, they turn round and say it cannot be had in the present suit, because they are not named in the bill as her heirs. It must be recollected complainant's bill is filed to obtain a title

to the farm, and not to charge defendants with a debt of the father; for, in that case, it would be necessary to show they had inherited property from the father to pay the debt, and property inherited of the mother would not make them liable to the creditor of the father. There is a great difference between such a case and the one before the Court. They were made parties because they claimed an interest in the farm. If they claimed no interest in the farm, there was no necessity for making them parties, and the bill for that reason should be dismissed against them; but, claiming an interest, they were properly made parties, although they are described in the bill as the heirs of the father instead of the mother.

[*415] *It is immaterial through which of their ancestors they derived title, so far as the necessity existed for making them parties. If defendants wished to avail themselves of the objection, that it did not appear on the face of the bill they had any interest in the suit, they should have demurred. It is too late to raise it on the hearing, after proofs have been taken and it appears to the Court the proper parties are before it.

The personal representative of Cyrus Chipman, if there be one, should have been made a party, as he would be entitled to the compensation to be made for the support of his testator, or intestate, after he left Newton's. It is probable there is none, as Cyrus does not appear to have left any property at his death. I shall therefore direct a reference to a Master to inquire whether there is any personal representative, and if there be, complainant is to have leave to make such personal representative a party by supplemental bill. If there be none, then the Master is to inquire and report what sum is due to Samuel F. Chipman for supporting his father, (it appearing he resided with Samuel,) subsequent to July 26th, 1839, or to any other person, or for necessary medicines, or medical attendance. The testimony already taken is to be used by any of the parties on the hearing before the Master, who is to be at liberty to summon such witnesses before him, and take such further testimony on the subject as he may think proper, and to make his report with all convenient speed.

*Wallace *v.* Dunning *et al.* [*416]

Where a complainant parted with his interest in a mortgage before answer, it was held a good objection to the suit.[1]

Bill to foreclose a mortgage.

Before answer, and after filing his bill, complainant assigned all his interest in the mortgage, and defendant put in a plea stating that fact.

O. D. Richardson in support of the plea.

M. L. Drake, contra.

The Chancellor. The plea must be allowed. The complainant has put himself out of Court, by parting with his interest in the mortgage. Defendant has a right to object that the party in interest is not before the Court. *Mills* v. *Hoag*, 7 Paige R. 18; *Field* v. *Maghee*, 5 Paige R. 539.

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*Alvin N. Hart *v.* Silas D. McKeen, Cephas G. Woodbury and Aaron Goodrich. [*417]

Different causes of complaint, of the same nature, and between the same parties, may be united in one suit, where the same relief is asked; but where the causes of complaint are dissimilar in their nature, and would require different decrees, it would embarrass, rather than expedite, the administration of justice, to allow them to be united in the same bill.[2]

A bill framed with a double aspect must be consistent with itself. It should not set up different and distinct causes of complaint that destroy each other.

[1] See Webster *v.* Hitchcock, 11 Mich. 56.

[2] See Ingersoll *v.* Kirby, *ante* 65, and note.

Demurrer for multifariousness.

June 11th, 1836, McKeen executed a mortgage to Oliver B. Hart, who, April 28th, 1841, assigned the mortgage to Alvin N. Hart, the complainant. December 25th, 1837, McKeen executed another mortgage to the defendant Goodrich. A. N. Hart acted as the agent of Goodrich in taking this mortgage, and the bill alleged that, soon after it was taken, a settlement of accounts took place between Hart and Goodrich, in which it was agreed the mortgage should become the property of Hart but, through inadvertency, no assignment of it was made to Hart, who then had, and always had had, the mortgage and accompanying note in his possession. May 2d, 1838, McKeen executed a third mortgage to the defendant Woodbury. The bill alleged this last mortgage, though taken in the name of Woodbury, was for the benefit or use of Hart, to whom it in equity belonged. December 12th, 1842, it was agreed between Hart and McKeen the Woodbury and Goodrich mortgages should be paid by the conveyance of certain real estate by McKeen to Hart, and on the twenty-third day of that month the agreement was consummated by the execution and delivery of deeds of the real estate, and releases of the mort-
[*418] gages. After the papers had been delivered, *McKeen, being acting register of Lapeer county where the real estate is situated, Hart handed the deeds to him to be recorded, which he agreed to do; and, when subsequently applied to, to know whether it had been done, he said it had not, but that it should be done immediately. He afterwards said they had not been recorded, and he did not intend to record them; when Hart asked him to rescind the agreement, or re-deliver the deeds to him, which he refused. The bill further stated that no proceedings had been had at law, &c., that there was a large sum due on the O. B. Hart mortgage, and also upon the Woodbury and Goodrich mortgages, if they had not been discharged by the aforesaid agreement of December; and prayed that McKeen might be decreed to have the deeds of conveyance recorded, and pay what was due on the O. B. Hart mortgage, or re-deliver to complainant the Woodbury and Goodrich mortgages, and pay

what is due on them, and in default thereof, be foreclosed, and for other and further relief. McKeen demurred.

H. N. Walker, in support of the demurrer.

E. B. Harrington, contra.

The Chancellor. Complainant asks a decree for the deeds delivered by him to McKeen to be recorded, which McKeen had previously executed and delivered to him in payment of the Woodbury and Goodrich mortgages. He also asks a foreclosure of the O. B. Hart mortgage. This mortgage is in no way connected with the deeds. It did not, like the Woodbury and Goodrich mortgages, enter into the consideration of the deeds. It is in no respect whatever connected with the agreement of the twelfth of December. Can then these two separate and distinct transactions be united in one and the same bill?

*Different causes of complaint, of the same nature, [*419] and between the same parties, may be united in one suit, where the same relief is asked; but where the causes of complaint are dissimilar in their nature, and would require different decrees, it would embarrass, rather than expedite, the administration of justice, to allow them to be united in the same bill. It is not for the interest of parties in equity, any more than at law, to mix up different transactions in the suit, having no affinity to each other. In the case of *The Attorney General* v. *Goldsmiths' Company*, 5 Sim. R. 675, the Vice Chancellor says, "I apprehend that, besides what Lord Redesdale has laid down on the subject, there is a rule arising out of the constant practice of the Court; and that it is not competent, where A. is sole plaintiff, and B. is sole defendant, for A. to unite in his bill against B. all sorts of matters wherein they may be mutually concerned. If such a mode of proceeding were allowed, we should have A. filing a bill against B. praying to foreclose one mortgage, and, in the same bill, praying to redeem another, and asking many other kinds of relief with

respect to many other subjects of complaint. Calvert on Eq. 87, 88, 89; *Johnson* v. *Johnson*, 1 J. C. R. 163. If Hart and McKeen were the only parties, the two causes of complaint, viz. the deeds and the O. B. Hart mortgage, are such as should not be united in one bill. They are unlike each other in every respect, and call for different decrees. If complainant should succeed, there would be one decree that McKeen deliver over the deeds which he wrongfully retains, and another that he pay what is due on the O. B. Hart mortgage, or in default thereof that the mortgaged premises be sold.

Complainant has framed his bill with a view to foreclose the Woodbury and Goodrich mortgages, should he fail in ob-
[*420] taining a decree for the deeds. As a foreclosure bill, it *is clearly multifarious, for Woodbury has no interest in the Goodrich mortgage, and Goodrich no interest in the Woodbury mortgage, and neither of them any interest in the O. B. Hart mortgage.

Waiving the question of multifariousness, could complainant have a decree of foreclosure of the Woodbury and Goodrich mortgages, should he fail as to the deeds? The bill sets forth the mortgages; it also states they formed the consideration of the deeds executed and delivered by McKeen to Hart on December twenty-third, and that they were then canceled. Can complainant in the same bill set up two causes of complaint, one of which destroys the other? Will the rules of pleading allow him in one part of the bill to allege those mortgages have been paid, and in another, that they have not been paid? To reconcile these conflicting statements, and make the bill consistent with itself, I must look upon that part of the bill setting forth the mortgages as intended merely to show the consideration of the agreement of December, and of the deeds subsequently executed in pursuance of it; and upon that part of the prayer which asks a foreclosure of these mortgages, in case complainant should fail in regard to the deeds, as wholly inconsistent with the case made by the bill. "A proper case for a bill with a double aspect," says Chancellor Walworth, "is where the complainant is in doubt whether he is entitled to

one kind of relief or another upon the facts of his case as stated in the bill. In such a case he may frame his prayer in the alternative; so that if the Court is against him, as to one kind of relief prayed for, he may still be entitled to obtain any other relief to which he is entitled, under the other part of the alternative prayer. So also where complainant is entitled to relief of some kind, upon the general facts stated in his bill, if the nature of the relief to which he is entitled *de- [*421] pends upon the existence or non-existence of a particular fact, or circumstance, which is not within his knowledge, but which is known to the defendant, he may allege his ignorance as to such fact, and call for a discovery thereof." *Loyd* v. *Brewster*, 4 Paige R. 537; *Colt* v. *Ross*, 2 Paige R. 396. A bill framed with a double aspect must be consistent with itself. It should not set up different and distinct causes of complaint that destroy each other.

Demurrer allowed and bill dismissed.

Mary Maria Story *v.* Martin Story.

In a suit by or against a wife, for a divorce, if she have no separate property of her own, the Court, when necessary, on petition, will grant her temporary alimony pending the suit, and require her husband to advance money to enable her to prosecute her suit, or make her defense.[1]

The affidavit of the husband, denying the ground on which the wife asks a divorce, is no answer to an application for alimony during the suit, but may be read to aid the Court in the exercise of its discretion as to the amount to be allowed.

[1] As to when alimony may be allowed, see Bishop *v.* Bishop, 17 Mich., 211; Cooper *v.* Cooper, id., 205; Chaffee *v.* Chaffee, 15 id., 184.

As to amount of, see Brown *v.* Brown, 22 Mich., 242.

Alimony is allowable on appeal. Goldsmith *v.* Goldsmith, 6 Mich., 285. See also, Chaffee *v.* Chaffee, 14 id., 463; Zeigenfuss *v.* Zeigenfuss, 21 id., 414; Goodman *v.* Goodman, 26 id., 417.

Petition for temporary alimony, and for money to carry on a suit by complainant against her husband for a divorce from the bonds of matrimony, on the ground of cruelty. Defendant's affidavit, denying the charge of cruelty, was read in opposition to the motion.

J. F. Joy, in support of the motion.

J. M. Howard, contra.

The Chancellor. In a suit by or against a wife for a divorce, where she has no separate property of her own [*422] *to support herself and enable her to carry on her suit, or make her defense, and her husband has property, the Court will compel him to make a suitable allowance for her maintenance pending the suit, and to furnish her with the means of employing counsel. *Mix* v. *Mix*, 1 J. C. R. 108; *Denton* v. *Denton*, id. 364; *Wood* v. *Wood*, 2 Paige R. 109. But for this wise provision of law, a wife, without relatives or friends to protect her rights, would be deprived of the means of applying to the judicial tribunals of the country for redress, when her rights were invaded by her husband; and of supporting herself pending the litigation.

Defendant's affidavit denying the cruelty, is no answer to the application, but it may, and should, be received to aid the Court in the exercise of a sound discretion, in fixing the sum to be allowed. *Wright* v. *Wright*, 1 Edw. Ch. R. 62; *Smith* v. *Smith*, id. 255; *Stanford* v. *Stanford*, id. 317; Poynter on Marr. and Div. 250, 251.

As the petition does not state what particular property defendant has, or what his pecuniary circumstances are, I shall direct a reference to a Master to inquire into them, and to report what amount ought to be allowed to complainant.

Motion granted

*Jesse P. Bishop *v.* Ezra Williams. [*423]

When a Master has commenced proceedings under an order of reference, they should be completed by him; and the party obtaining the order cannot transfer the proceedings to another Master to be completed.

Judgment creditor's bill. Motion for an attachment against defendant for not appearing before John S. Abbott, one of the Masters of the Court, to submit to an examination on oath touching his property, and to make an assignment thereof to a receiver, in pursuance of the Master's summons duly served on him for that purpose. The motion was opposed on the ground proceedings had been had on the order for the appointment of a receiver, before E. Taylor, another Master, before whom defendant had appeared and submitted to several examinations, when the proceedings were transferred to Mr. Abbott without defendant's consent, or any order of Court for that purpose.

A. Davidson, in support of the motion.

E. B. Harrington, contra.

The Chancellor. The motion must be denied. The proceedings under an order of reference should be completed by the Master before whom they are commenced. If, for any cause, this cannot be done, they may, by an order of Court, on a special motion made for that purpose, be transferred to another Master to be completed.

Motion denied.

[*424] *John H. Bailey and George B. Storm *v.* Seba Murphy, John J. De Graff *et al.*

A bank may take a mortgage for a debt *due* to it, with *seven* per cent. interest. (that being the legal rate of interest,) notwithstanding it is prohibited by its charter from taking "more than *six* per cent. per annum in advance. on its *loans or discounts*."

Bill to foreclose a mortgage.

The bill states that Murphy, on May 1st, 1839, *became and was justly indebted* to the Bank of River Raisin, in the sum of $1,200, and that, to secure the same, he on that day executed a bond and mortgage to the bank, in the penal sum of $2,400. conditioned for the payment of $1,200 in one year, with interest at the rate of *seven* per cent. per annum. That the bond and mortgage were given to the bank as security for a debt *previously contracted*, in the regular course of business. That, November 20th, 1839, the bank assigned the bond and mortgage to Robert McClelland, who "afterwards to wit on 25 *February* 1839," assigned the same to complainants. De Graff demurred to the bill.

T. Romeyn, in support of the demurrer.

A. D. Fraser, contra.

The Chancellor. The mortgage was executed to the President, Directors and Company of the Bank of River Raisin. The nineteenth section of the charter of the bank is in these words: "That the said corporation shall not take more than six per centum in advance, on its *loans or discounts*." The mortgage is conditioned for the payment of seven per cent. interest; and it is insisted the bank, by the aforesaid nineteenth section of its [*425] charter, is *prohibited from making such a contract, and that the mortgage for that reason is null and void. *The Bank of Chillicothe* v. *Swayne et al.*, 8 Ohio R. 285, is cited in support of the proposition. That was a clear case of discount.

In the present case the mortgage was given to secure a pre-existing debt due to the bank, and not for a loan or discount, on which only six per cent. interest could be taken.

A loan or discount is an advance of money to be repaid at a future day. When the interest is taken in advance, it is a discount; but when it is to be paid at the expiration of the credit, or quarterly, or yearly, where an extended credit is given, it is a loan. A mortgage for a pre-existing debt is neither a loan nor a discount. It wants the chief ingredient of a loan or discount, viz: an advance of money.

The nineteenth section of the charter extends to loans and discounts only. In regard to all other contracts relating to interest, the bank stands on an equality with individuals. By the ninth section, it may take real estate in payment of debts previously contracted in the course of its dealings, or purchase it at sales on judgments obtained for such debts. There can be no doubt of its right to sell the real estate so acquired, and to take a mortgage for the whole or part of the purchase money, payable at a future day, with seven per cent. interest, that being the legal rate of interest. It would not be a discount or loan, and there is nothing in the charter prohibiting it. In an action on a note discounted by the bank, it may recover, as damages, the legal rate of interest, although by its charter it is limited to a less per centum on loans and discounts. It was so decided in the case of *The United States Bank* v. *Chapin*, 9 Wend. R. 471. It is the law, and not the contract, that gives the right to legal interest in such a case, after a breach of the contract. The loan, by the terms of the *contract, is at an end; and the money is detained [*426] against the will of the party advancing it. I see no reason, therefore, why a bank, in such circumstances, may not give time, and take security for both principal and interest, when the sole object perhaps, in giving time, is to obtain security for the debt. Had the legislature intended to restrict the bank to six per cent. interest, in all cases, it is but reasonable to presume they would have used more appropriate terms than the words "loans or discounts" to express their intention.

Another objection urged by defendant is, that complainants claim under an assignment executed by R. McClelland in February, 1839, of a mortgage executed in May, 1839. The bill states the bank assigned to McClelland November 20th, 1839, and that McClelland "*afterwards*, to wit, on 25th February, 1839," assigned to complainants. It then stated that the assignment was acknowledged by McClelland on 25th February, 1841. The year 1839 is undoubtedly a clerical error, and should be 1841. The bill, however, is sufficient, for it states McClelland assigned to complainants *after* the bank had assigned to him, and the year 1839 may be rejected as surplusage.

Demurrer overruled.

[*427] CALVIN W. HOW, FISHER HOW, WILLIAM BAGLEY, SOLOMON WARRINER, BUSHROD BIRCH, HENRY S. WHITTEMORE, HENRY SUYDAM, AND ISAAC H. REED, *v.* SAMUEL CAMP, BOLVILLE SHUMWAY AND ABNER W. CAMP.

DANIEL ELDRED *et al. v.* THE SAME DEFENDANTS.

JAMES KELSO *et al. v.* THE SAME DEFENDANTS.

A debtor has a right to prefer one creditor or class of creditors to another, and on assigning his property for the benefit of creditors, may lawfully require a particular creditor or class of creditors to be paid in full, although his other creditors, in consequence thereof, may nor receive anything.[1]

The denial of fraud by a defendant, in his answer, is not conclusive upon the Court, if the facts and circumstances of the case are such as irresistibly to lead the mind to a different conclusion. When fraud is denied, it is not to be inferred from slight circumstances; but a denial of it does not preclude inquiry, or disarm the Court of its power, when, from the pleadings and proofs, it is satisfied of its existence.[2]

[1] See Town *v.* Bank of River Raisin, 2 Doug., 530.

[2] Fraud will not be presumed, but must be proved. Robert *v.* Morrin, 27

How *v.* Camp; Eldred *v.* Camp; Kelso *v.* Camp.

Where a conveyance was actually and not only constructively fraudulent, and a bill was filed by creditors to set it aside, and the grantee was compelled to account for moneys received by him out of the property, it was held that he should be credited with all taxes and improvements made by him, but for no advances made to his grantor, unless the money was used by the latter, before complainants filed their bill, to pay debts due from him at the time he made the fraudulent conveyance.[1]

The complainants in the first above entitled cause, on October 17th, 1838, recovered the following judgments in the Circuit Court of Hillsdale county, against the defendants, Samuel Camp and Boville Shumway, as partners: Calvin W. How and Fisher How, a judgment for $1,984.97; William Bagley, a judgment for $871.80; Henry Suydam and Isaac H. Reed, a judgment of $622.37; and Solomon Warriner, Bushrod Birch, and Henry S. Whittemore, a judgment for $1,123.80. April 17th, 1839, writs of *fieri facias* were issued on the several judgments returnable *on the third Tuesday of [*428] October following, on which day they were returned unsatisfied by the sheriff of Calhoun county, in which county defendants resided. January 27th, 1840, complainants filed their bill setting forth the judgments, executions, and sheriff's return; that the judgments remained unsatisfied; and that complainants had reason to believe, and did believe, Samuel Camp had equitable interests of the value of a hundred dollars and more, which could not be reached by execution. The bill further stated that, on the sixth day of August, 1838, Samuel Camp, to secure to his own use, and to hinder, delay, and defraud complainants and his other creditors, conveyed real estate described in the bill, to his brother Abner W. Camp; and that he, at the same time, for a like purpose, assigned to his brother

Mich., 306; The People *v.* Lott, 36 Ill., 447. There is, however, no standard of evidence of fraud; but, like any other fact, it is to be proved by any facts or circumstances which satisfy the mind of its existence. It may be, and generally is, inferred from circumstances, and cannot often be proved in any other way. O'Donnell *v.* Segar, 25 Mich., 367. See, also, Duffield *v.* Delaney, 36 Ill., 258; Smith *v.* Brown, 34 Mich., 455.

[1] See Taylor *v.* Snyder, *post*, 490.

a promissory note and mortgage for $5,000, dated February 26th, 1836, particularly described in the bill.

Boville Shumway did not appear, and the bill was taken against him *pro confesso*. The Camps appeared, and put in a joint and several answer. They admitted the judgments, &c., but denied Samuel Camp had, at the time of filing the bill, equitable interests, things in action, or other property, of the value of $100. They admitted the conveyance of the real estate, and the assignment of the note and mortgage on the sixth day of August, 1838, but denied all fraud, or intent to hinder, delay, or defraud complainants, or other creditors of Samuel Camp; and stated the deed and assignment were made for the purpose of enabling Samuel Camp to pay his individual creditors. They stated the consideration of the deed and assignment was $7,000, for which Abner executed to his brother his fourteen promissory notes of $500 each, payable with interest, as follows: one in one year, one in two years, one in [*429] three years, one in four years, one in five *years, one in six years, two in seven years, one in eight years, two in nine years, one in ten years, one in eleven years, and one in twelve years. That all of the notes had been paid by advances of money, rent, and the like, except the last five, which were assigned by Samuel Camp, January 22d, 1840, to E. Smith Lee, for the benefit of his individual creditors. That Samuel Camp owed individual debts, at the time of the aforesaid conveyance and assignment to his brother, to the amount of $4,000, and that he had paid about $600 of these debts with the money received of his brother. The individual debts mentioned in a Schedule attached to the assignment to Lee, amounted to $1,992.75. Replications were filed and testimony taken; but the facts are so fully commented on in the opinion of the Court, as to render it unnecessary to notice them more fully in the statement of the case.

G. Woodruff, for complaints.

A. Pratt, for defendants.

THE CHANCELLOR. The Camps deny all fraud, and all intention to defraud complainants, or other creditors of Samuel Camp, in the most full and explicit terms; and state the object of the sale was to enable Samuel Camp to provide for the payment of his individual creditors out of his individual property, and to prevent its being sacrificed for the payment of the partnership debts of Camp and Shumway, to pay which the partnership property had been assigned. A debtor has a right to prefer one creditor or class of creditors to another, and, on assigning his property for the benefit of creditors, may lawfully require a particular creditor, or class of creditors, to be paid in full, although his other creditors, in consequence thereof, may not receive anything. There was nothing, *therefore, [*430] improper in Samuel Camp's selling his individual property to pay his individual creditors, in preference to the partnership creditors of Camp and Shumway. Was the sale to his brother made for that purpose, or for another and different purpose? Was it designed for the benefit of his individual creditors, or intended as a cloak to cover up his property, and keep it from his creditors? This is the point to be determined.

The denial of the fraud by defendants, in their answer, is not conclusive upon the Court, if the facts and circumstances of the case are such as irresistibly to lead the mind to a different conclusion. When fraud is denied, it is not to be inferred from slight circumstances; but a denial of it does not preclude inquiry, or disarm the Court of its power, when, from the pleadings and proofs, it is satisfied of its existence.

The alleged object of the sale was to pay individual creditors, in preference to partnership creditors. This might have been effected in two ways;—by an assignment of the property in trust for creditors generally, giving the individual creditors a preference over the partnership creditors, or by a cash sale of so much of the property as was necessary to pay the individual creditors. One or other of these modes, supposing the individual creditors too numerous to be conveniently secured by separate mortgages, would have suggested itself to the mind of almost any honest debtor. But neither was adopted in the

present case, or appears to have been so much as thought of by the Camps, although what they did was done, (to use the language of the answer,) "for the honest and *bona fide* purpose of enabling Samuel Camp to pay and satisfy his individual creditors." They devised a way entirely new and unheard of, for such a purpose;—one as well calculated to hinder and [*431] delay creditors in the collection of their *just dues, as could well be invented by the ingenuity of an insolvent debtor;—one which, if sustained by a court of justice, would enable a debtor in failing circumstances to place his property beyond the reach of his creditors, for an almost indefinite length of time, if not secure the enjoyment and benefit of it to himself and family.

The individual debts, according to the answer, amounted to about $4,000; and how is it proposed to secure them? In neither of the ways above suggested. Neither does Samuel Camp make known his wishes to his individual creditors; he gives them no intimation of what he is about to do; he does not consult with them as to what he should do, or how it should be done, or what would be most acceptable to them. He is notoriously insolvent; the firm of Camp and Shumway, of which he was a partner, had already made an assignment for the benefit of the partnership creditors; and he, as the answer states, being fearful the partnership creditors would seize on his individual property, and that nothing would be left for his individual creditors, goes to the State of New York, where he has a brother residing, and conveys all his property to him for $7,000, and takes in payment his brother's fourteen promissory notes, payable, with interest, in from one to twelve years, one each year, except that two are made payable in seven years, and two in nine years. No money is paid down,—not a dollar. No mortgage is taken on the land conveyed, or other security exacted for the payment of the notes, the last of which would not be due under twelve years, and none of them under a year.

If the notes had been paid as they became due, and the money had been faithfully applied by Samuel, it would have required eight years to pay $4,000. Will the law allow an in-

solvent debtor, under the pretext of giving a preference to certain creditors, to make such a disposition *of his [*432] property? If it will, courts of law, with regard to the collection of debts, might as well be abolished at once; for no debtor will permit his property to be sold on execution, if he may sell it to a friend on any length of credit that may be agreed on between them, and thereby prevent its falling into the hands of his creditors. But what was to become of the $3,000 remaining after the individual debts were paid? It was not to go to the creditors of Camp and Shumway; for the reason assigned for selling the property was to prevent its being taken in execution by the partnership creditors.

The deed of the real estate to Abner is not signed by Samuel's wife. It may be said it was executed in the State of New York. That is true, but she is not named in it, and it does not appear she has ever released, or been asked to release her inchoate right of dower. The deed, though executed and acknowledged in the State of New York, was not delivered there but in Detroit. It bears date on the sixth of August, was acknowledged on the nineteenth, and, three or four days thereafter, was delivered at Detroit, where the sale was consummated. Stopping here, the sale should be declared fraudulent and void as to creditors. Notwithstanding the answer denies any intention to hinder, delay, or defraud creditors, it must be obvious to every one such would be the effect of the deed and assignment, if sustained. It seems to me almost impossible, for men entertaining anything like correct notions of the moral obligations existing between debtor and creditor, to come to a different conclusion.

The conduct of the parties has not been of such a character, since the sale, as to dispel the cloud hanging over it. Samuel denies that he has, since then, been in possession of all the land conveyed, but admits his possession of the two dwelling houses and store, under an agreement *made at the [*433] time. By the agreement he was to have the dwelling houses and store, until the following May. There was no agreement as to the rent, except that he was to pay what should

be right. He lived in one of the houses, and the other house and store were in possession of tenants paying rent, which he was to receive. A house to live in was necessary, but the receipt of the rent for the other buildings by him, is a suspicious circumstance. He was to have the rents as the lessee of his brother. They were not to be received by him as agent, nor were they reserved by him when he sold out. The dwelling houses and store, I take it for granted, were the only parts of the property that were at the time productive. There is no positive testimony upon this point, but it is, I think, the only inference to be drawn from the whole case.

About the eighteenth of October, nearly three months and a half after the sale, it was agreed the rent should be at the rate of $500 a year, over and above the taxes, which were to be paid by Samuel. At this time it was also agreed Samuel should have the premises for one year from the first of May, 1839, a lease was executed, and the year's rent paid in advance, by delivering up the $500 note payable in two years. This lease has not been produced by defendants. On the seventeenth day of the same month, complainants obtained their judgments.

About this time Abner advanced to Samuel $2,400 in cash, and canceled a debt of $500 cash advanced for him a few days before, and, in consideration thereof, Samuel gave up seven of the $500 notes.

On the tenth of September, 1839, the first $500 note was paid. This note, though the first to become due, was not paid until eight of the notes falling due long after it, had been taken up. The answer states it was paid as follows: $100 in [*434] cash, a note for $150, dated July *12th, 1839, payable in a year, with interest, and the rent of the premises up to May 1st, 1839. The rent due on the first of May, at $500 a year, being nine months, lacking six days, was $367, which, added to the $250, cash and note, would make $617, instead of $538, the amount of the $500 note including interest.

With the $2,400 cash, Samuel paid about $600 of his individual debts, and the balance was spent in supporting himself and family. Four thousand five hundred dollars of the notes

were used up in paying $600 of individual debts, and supporting himself and family a year and nine months.

On the twenty-second of January, 1840, Samuel assigned the remaining five notes to E. Smith Lee, for the benefit of his individual creditors. This was after the Eldreds had filed their bill.

The $5,000 mortgage was foreclosed at law by advertisement, and the mortgaged premises, consisting of seven eighty-acre lots, bid off by Abner, December 28th, 1838, for what was due on the mortgage. Three of these lots were afterwards sold by him, July 9th, 1839, to Samuel Sharpsteen, for $1,350; and on the eleventh day of the same month, he mortgaged two of the village lots in Marshall to Jonathan Hedges, for $2,400.

On May 4th, 1840, he appointed Herman Camp, a young man, but twenty-one years of age, and a son of Samuel Camp, his attorney, to sell, and convey or lease, the whole or any part of the premises, and to make, execute, and acknowledge deeds, &c. On May 14th, 1841, a year after, when Herman was examined as a witness, no account had been rendered by him to his uncle, but he stated he expected to account to him for all moneys he had received and paid out. He had, in the mean time, paid his *father $162 of the rents, for ma- [*435] terials furnished, and repairs made by him on the premises.

A mortgage, executed by Samuel and his wife to one Cleveland, a few months previous to the sale, on a part of the premises, Samuel caused to be discharged in the summer of 1839.

The answer states the whole consideration was $7,000. The deeds state a consideration of $6,000, and the assignment of the mortgage a consideration of $5,000, making together $11,000.

Other circumstances might be mentioned, but I do not deem it necessary, as I entertain no doubt of the true character of the transaction, and of my duty to declare the sale fraudulent and void as to the creditors of Samuel Camp.

A decree must be entered delaring the deed and assignment

to Abner W. Camp, fraudulent and void, as against complainants, except as to the premises sold to Sharpsteen, and the Hedges' mortgage, which are not to be affected by the decree. And a receiver must be appointed, with the usual powers of a receiver on a judgment creditor's bill, to whom Abner W. Camp must convey, by deed, the premises conveyed to him by Samuel, and the premises described in the mortgage assigned to him, except the part sold to Sharpsteen,—the decree to vest the receiver with the title of the premises to be conveyed, and to stand in the place, and have the effect of such conveyance, until a conveyance is duly executed and delivered. Possession of the premises must be delivered to the receiver, and Abner W. Camp must account to the receiver before a Master, who must make out and state the account, for the purchase money received of Sharpsteen, with interest, and for the amount due at the time of taking the account, on the Hedges' mort-
[*436] gage, and the rents and profits received *by him or his agent, and be credited with all taxes paid and improvements made by him, but for no advances of money to Samuel, unless the money was used by Samuel, before complainants filed their bill, to pay debts due from him at the time he conveyed to Abner. So far as such payments are concerned, the conveyance to Abner has not operated as a fraud on creditors, or to the prejudice of the rights or preference acquired by complainants on filing their bill, and should therefore be allowed in the account. But no other advances of money to be allowed; for this is not a case of constructive, but of positive fraud against creditors, in which the grantee is *particeps criminis*. When that is the case, the rule is not to allow the grantee, in taking an account, for any advances made to the grantor, as it would, to the extent of such allowance, be giving effect to the fraud, and remove the chief obstacle to third persons' assisting debtors in defrauding their creditors, by indemnifying them against pecuniary loss in case of detection. *Sands* v. *Codwise*, 4 J. R. 536, 598; *Boyd* v. *Dunlap*, 1 J. C. R. 482; *Bean* v. *Smith*, 2 Mass. R. 252. And Abner Camp must pay the amount found

due from him to the receiver. Complainants to receive their costs.

The same decree must be entered in the other two causes.

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*William T. Cutter, William F. Bulkley, Jonathan Hunt, and Charles Ely *v.* Jerome B. Griswold. [*437]

Where a deed of real estate was taken in the name of a son who was a minor, to keep it from the creditors of the father, and it was afterwards sold by the sheriff on an execution against the father, the son was decreed to release to the purchasers at the sheriff's sale.[1]

Every voluntary conveyance by a parent to a child, is not fraudulent against creditors, but, when made in good faith by way of advancement, and abundant property is retained by the parent to pay all his debts, it is good against existing as well as subsequent creditors.[2]

In October, 1840, Henry D. Garrison obtained a judgment against Eber Griswold, for $425.45 damages, and $41.69 costs, in the Circuit Court for the county of Berrien, on a note executed to Garrison in 1838, after Eber Griswold had married the widow Pool, by Hussey, Sanger and Mason, and guarantied by Eber Griswold, for a debt due from the widow Pool to Garrison previous to her marriage with Eber Griswold. Execution was

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[1] See Elliott *v.* Horn, 10 Ala., 348; Ewell's Lead. Cases on Infancy and Coverture, 75.

[2] See Beach *v.* White, *post*, 495; Herschfeldt *v.* George, 6 Mich., 466; Maynard *v.* Hoskins, 9 id., 489; Moritz *v.* Hoffman, 35 Ill., 553; Gridley *v.* Watson, 53 id., 186; Sweeney *v.* Damron, 47 id., 450; Bridgford *v.* Riddell, 55 id., 261. Pratt *v.* Myers, 56 id., 23; Mitchell *v.* Byrns, 67 id., 522; Emerson *v.* Bemis, 69 id., 537; Patrick *v.* Patrick, 77 id., 555.

As to when liable to be impeached by subsequent creditors, see Moritz *v.* Hoffman, *supra*; Mixell *v.* Lutz, 34 Ill., 382; Wooldridge *v.* Gage, 68 id., 157; Phillips *v.* North, 77 id., 243; Beach *v.* White, *post*, 495; Herschfeldt *v.* George, *supra*; Keeler *v.* Ulrich, 32 Mich., 88.

taken out, and lot number two, on H. B. & C. W. Hoffman's addition to the village of Niles, was levied on by the sheriff, and, on the the 3d day of July , 1841, sold by him to complainants for $500, they being the purchasers at the sheriff's sale. The lot was purchased of Robert Griffin by Eber Griswold, in April, 1839, and the deed taken in the name of the defendant, a minor son of Eber Griswold. The bill was filed against Eber Griswold and Jerome, and charged the deed was taken in Jerome's name to hinder, delay, and defraud the creditors of Eber Griswold, &c. Eber Griswold died without having put in an answer, when the suit abated as to him, and the usual answer was put in by the guardian *ad litem* of Jerome, a replication filed, and testimony taken.

[*438] **C. Dana*, for complainants.

J. S. Chipman, for defendant.

The Chancellor. The lot in question was conveyed to Jerome by Griffin, in consideration of other lands conveyed at the same time to Griffin, by Eber Griswold, the father of Jerome. The purchase was made by Eber Griswold, and the consideration was paid by him, but the deed was taken in the name of his son, who then was, and still is, a minor.

Every voluntary conveyance by a father to his child, cannot be avoided by the creditors of the father. When made in good faith by way of advancement, and abundant means are retained by the father for the payment of his debts, the conveyance, though voluntary, is good against existing as well as subsequent creditors. *Van Wyck* v. *Seward*, 6 Paige R. 62; *Bank of United States* v. *Hausman*, *id.*, 526; *Seward* v. *Jackson*, 8 Cow. R. 406; *Jackson* v. *Post*, 15 Wend. R. 588; *Salmon* v. *Bennett*, 1 Day Conn. R. N. S. 525.

For aught that appears, Eber Griswold parted with all his property to Griffin, in consideration of the deed to Jerome. The Garrison debt was then in existence; Jerome was but sixteen years of age; and Eber Griswold took immediate possession of the lot, and resided on it till his death. The legal

inference to be drawn from these facts is, that the deed was taken by Eber Griswold in Jerome's name, to keep the property from his creditors. The evidence introduced for the purpose of showing the property deeded to Griffin was held by Eber Griswold in trust for Jerome, does not establish that fact.

A decree must be entered declaring the deed from Griffin to Jerome was taken in the name of the latter to hinder, delay, and defraud the creditors of Eber Griswold ; *and [*439] Jerome must, within six months after he comes of age, and is served with a copy of the decree, execute and deliver to complainants a quit-claim deed of the premises in question, unless within the said six months he show good cause why he should not be bound by the decree. The complainants must be let into immediate possession of the property, and, until such quit-claim deed is executed and delivered, or cause shown, the decree to stand in the place, and have all the effects, of such release, on being recorded by the register of deeds of the county where the premises are situated.

Kimball *v.* Ward *et al.*

Where an answer on oath is waived, it must, notwithstanding, be signed by defendant.

Complainant having waived an answer on oath, defendants' solicitor put in several answers for his clients, subscribing their names to the answers. The cause afterwards being brought on for hearing on pleadings and proofs, complainant's solicitor, on an affidavit stating he had just discovered the defendants' names had been subscribed to their answers by their solicitor, and not by themselves, moved to have them taken from the files, and the bill taken as confessed.

Bacon, in support of the motion.

Dana, contra. 399

The Chancellor. The defendants should, themselves, have subscribed their names to the answers. The waiver [*440] *of the oath was no waiver of an answer subscribed by them. *Denison* v. *Bassford*, 7 Paige R. 370. The motion is granted, unless defendants sign the answers put in for them by their solicitor, and pay five dollars costs, within sixty days.

Joseph Garlinghouse, Wheeler Reed and Amos Dixon *v.* John Dixon and James B. Welles.

A mistake in a deed, or other written instrument, when proved to the satisfaction of the Court, is a good ground for refusing relief to which complainant would otherwise be entitled.[1]

In August, 1836, John Dixon, of Ontario county, New York, employed Seneca Hale, of Lenawee county, Michigan, to purchase government lands for him, and left with Hale $1,800, for which he took a receipt. On December 14th, 1836, John Dixon assigned all his property, real and personal, to complainants, in trust for his creditors. The assignment, among other things, stated Dixon was the owner of, and had the legal or equitable estate in, divers tracts and parcels of land in Michigan, which, having been purchased by his agents, who had not furnished him with a description or statement of such purchases, he was unable to particularize or describe; but meaning and intending the said lands, and all his estate and interest therein, should pass by his assignment to complainants, he thereby granted, bargained, sold, assigned, conveyed, and confirmed to complainants, all and singular the lands, tenements, hereditaments, and estate whatsoever, owned by, or belonging to him, or in [*441] which he had any right or *interest whatsoever, in law or equity, in severalty, or jointly with any other person

[1] See Norris *v.* Hurd, *ante*, 102.

or persons, wherever the same might be, in Michigan, and all the right, title, interest, property, and estate, whatsoever, in law or equity, of, in, or to any such lands or real estate, and all vouchers, receipts, contracts, agreements, certificates or securities whatsoever, relating or in any wise appertaining to the same. On January 27th, 1837, at the request of J. Dixon, Hale conveyed, and procured to be conveyed by one Brown, four hundred and eighty acres of land to Welles, the same having been purchased with the money mentioned in the aforesaid receipt. In August, 1838, complainants filed their bill for a conveyance of these lands by Welles to them, as trustees under the assignment, charging that Welles had notice of the assignment to them, when the lands were conveyed to him by Hale and Brown.

The defendants answered. John Dixon stated in his answer that the assignment to complainants was not intended to embrace the money mentioned in the receipt of Hale, or the land that had been purchased with the money; and that it was so understood by complainants and himself at the time, and that instructions to that effect were given to the person who drew the assignment. He further stated, that he had, previous to his assignment to complainants, parted with his interest in the receipt to Robert Dixon, John Cowman, and the defendant, Welles. When he left the money with Hale, he was indebted to Welles as trustee of the estate of Plyn Weller, in the sum of $859.27, money collected by him for Welles on notes belonging to the Weller estate. And, soon after his return from Michigan to the State of New York, where he resided, he received $800 of Robert Dixon, and $500 of John Cowman, and and agreed with them that they should share *pro rata*, in the lands to be purchased with the $1,800; *and that, [*442] from that time forward, he held the receipt in trust for Robert Dixon, John Cowman, and the defendant Welles. That, on December 9th, 1836, he made the following assignment on the back of the receipt: "I hereby assign, set over, and transfer this instrument, for the use and benefit of those for whom I hold it in trust. Dated this ninth day of Decem-

ber, 1836. *John Dixon.*" Previous to this, he had made a memorandum at the bottom of the receipt, in these words: "Of the above named money, eight hundred dollars belongs to Robert Dixon, five hundred dollars to John Cowman, and the residue to other persons for whom it was received by me in trust." That Welles was not named in the memorandum, as the $859.27 belonged to him as trustee, and he, Dixon, was indebted to him, individually, on a separate account for money borrowed, and did not intend to connect this last debt with the receipt. In January following the assignment to complainants, Dixon was in Michigan, and saw Hale, and informed him of the assignment to complainants, that the receipt was not embraced in it, and that the money left with him, or the lands purchased with it, belonged to Robert Dixon, John Cowman, and defendant Welles. He afterwards saw Welles, and gave him the same information, and thereupon the lands mentioned in the bill were conveyed to Welles, and other lands to Cowman and Robert Dixon.

The answer of Welles set up the same facts, but was on information and belief only, except as to the indebtedness of Dixon, and the conveyance of the land.

Replications were filed, and testimony taken. John Dixon was examined as a witness on behalf of Welles, and Mr. Sibley, the attorney who drew the assignment, on behalf of complainants.

[*443] **H. N. Walker*, for complainants.

The memorandum at the foot of the receipt is not signed, and states that, of the money mentioned in the receipt, $800 belonged to Robert Dixon, $500 to Cowman, and the residue to other persons from whom it was received by Dixon *in trust*. Dixon never received any money from Welles in trust. Dixon says in his deposition, he set apart this interest in the receipt to satisfy Welles for money he had collected for him as trustee of the estate of Plyn Weller;—in other words, to pay a debt. The assignment of the receipt on December ninth is

for the use and benefit of the persons for whom he held the money in trust. Before any persons can claim, besides Robert Dixon and Cowman, any interest in the receipt, as against complainants, they must show that a portion of the money mentioned in the receipt was actually received from them in trust by Dixon. Welles shows no such thing, but the reverse. If the assignment of the receipt is to be regarded in the light of a contract, and Welles as a party to it, it is inoperative as against the complainants. Dixon testifies Welles had no notice that the assignment under which he now claims had been made, until Dixon informed him of it, in the winter of 1837. It was not, then, so much as a valid agreement, binding on the parties at the time the general assignment was executed. It wanted the assent of Welles, to make it a contract binding on the parties. 12 J. R. 190; 3 J. R. 534; 7 J. R. 470.

G. Miles, for defendants.

It was not the intention of the parties to include the Hale receipt, or the lands purchased by him, in the assignment to complainants. The testimony of Dixon, and Mark Sibley, who drew the assignment, is conclusive on this point. The assignment of the receipt on December *ninth, passed [*444] Dixon's interest in the money for which the receipt had been given, and his equitable interest in the land purchased.

The Chancellor. The assignment to complainants was not intended to embrace the Hale receipt, or the land purchased with the $1,800. The evidence is full and conclusive on this point. The receipt is not mentioned in the schedule of property, and Dixon's testimony is clear and explicit. He testifies to admissions made by two of complainants since the assignment, and to a conversation that took place before the assignment, as well as to what occurred at the time it was drawn up and executed. Sibley, who drew it, says, when that part of it which relates to the real estate in Michigan was read over to Dixon, he expressed some doubts whether it would not pass lands which had been purchased in his name with money that

had been deposited with him. Sibley told him it would not, because he was not the owner of, and had no interest in, lands which had been purchased with such trust funds; and that such lands would belong to the depositors, in whosesoever's name the certificate of purchase might have been taken. He had before told Sibley the lands purchased with the money left with Hale were not to be included in the assignment, and that the money had been deposited with him by Robert Dixon, Cowman and Welles, the defendant, in trust. The two former had deposited money with him after his return from Michigan, on an agreement they should share *pro rata* in the purchases to be made by Hale; and he was indebted to Welles as trustee of the Weller estate, for money he had received belonging to that estate. To carry out his agreement with the former, and secure Welles as trustee, he first made the memorandum at the foot of the receipt, and afterwards [*445] *the assignment of the receipt, on December 9th, 1836, five days before his assignment to complainants for the benefit of his creditors. Considering himself thenceforward as having parted with all his interest in the receipt, and as holding it in trust for Robert Dixon, Cowman and Welles, it is not at all surprising he should have stated to Sibley, when he informed him he held the receipt in trust, that the money had been left with him for the purchase of lands. This was literally true in regard to Robert Dixon and Cowman, for one had paid him $800, and the other $500, to be invested in land. He spoke with reference to this money, and did not enter into the history of the receipt; while Sibley understood him to speak of the identical money left with Hale, and gave it as his opinion that the money in Hale's hands, or the lands purchased with it, would not pass by the deed of assignment to complainants.

Accidents and mistakes are a fruitful source of equity jurisdiction, and the Court is frequently called on to give relief against them. Hence, a mistake in drawing a deed, or any other written instrument, when proved beyond all question, to the satisfaction of the Court, is a good ground for refusing relief to a party who would otherwise be entitled to it. *Gilles-*

pie v. *Moon*, 2 J. C. R. 585. I have no doubt the deed of assignment was not intended by the parties to embrace the receipt, or lands purchased with the money for which it was given; and shall therefore dismiss complainants' bill with costs.

Bill dismissed, with costs.

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*Lewis Benedict *v.* William R. Thompson [*446] *et ux.*

A rehearing will not be granted where a party, by lapse of time, has lost his right to an appeal.

Petition by Thompson for a rehearing.

The petition stated that, on the 15th day of August, 1840, complainant filed his bill of complaint for the foreclosure of a mortgage; that defendants were duly served with process, and appeared, but failed to answer the bill, which was taken as confessed; and that, on the 31st day of August, 1842, a decretal order was made, adjudging and decreeing, among other things, that all and singular the mortgaged premises, or so much thereof, at two-thirds their appraised value, as should be sufficient to satisfy the amount due, be set off by metes and bounds, under the direction of a Master, by three disinterested freeholders of the county of Washtenaw, where the premises were situated, in pursuance of an act entitled "An act to provide for the transfer of real estate on execution, and for other purposes." The petitioners were advised, and believed, the decretal order, in the part above set forth, and in all its parts which directed the appraisal and setting off of the premises to complainant, according to the aforesaid act, was erroneous, against the express agreement of the parties to the mortgage, and against law and equity; and that the decree should have directed a sale of the mortgaged premises, according to the usage and practice of the

Court previous to the passage of the act. The petition further stated that complainant, on August 26th, 1843, caused the mortgaged premises to be appraised and set off, by metes
[*447] and bounds, &c., and that complainant, on *the second day of September following, accepted the premises as appraised and set off.

W. A. Fletcher, in support of the motion.

J. Kingsley, contra.

The Chancellor. Since the decision of the Supreme Court of the United States, in *Bronson* v. *Kinzie*, 1 Howard R. 311, the act under which the decree was entered, requiring mortgaged premises, as well as real estate taken on execution, to be set off by metes and bounds at two-thirds their appraised value, has been held to be unconstitutional and void as to previous contracts, and not binding upon this Court. A rehearing should, therefore, be granted, if it can be done consistently with the established rules of law.

The object of a rehearing is to save the expense and delay of an appeal, and to give the Court an opportunity of reviewing and correcting a decree made by itself, if erroneous. It can be granted only before enrollment; but the same object may be obtained after the decree has been enrolled, by a bill of review. By a rule of the English Court of Chancery, a petition for a rehearing must be presented within a fortnight after the order pronounced. 2 Madd. Ch. 482. This rule, however, does not appear to have been rigidly adhered to of late, and is important only as showing the short time allowed there for making the application. We have no rule on the subject. But a decree cannot be enrolled until the expiration of thirty days from the time it is entered in the minutes of the Court; R. S. 369; so that, in all cases, the parties have thirty days to present their petition in, and how much longer, in case the decree is not enrolled, is the question to be now decided.

[*448] *Ninety days only are allowed for appealing from the decree or final order of this Court to the Supreme Court,

R. S. 379, and, by the 105th rule of Court, a bill of review must be brought within the time allowed for bringing an appeal. From analogy, it would therefore seem, where the decree has not been enrolled, a rehearing should not be granted on a petition presented after the time for appealing had expired. A different rule would vest the Court with power to reverse its own decrees, after that power had ceased to exist in the appellate Court; and to open anew litigation, which the statute limiting appeals to ninety days was intended to put at rest, after that time, where no appeal had been taken.

If defendants were dissatisfied with the decree, and wished to contest the constitutionality of the law under which it was entered, they should have taken their appeal within the ninety days. They should not have lain by until the question was settled, in another case, and by another Court, and the time for appealing had expired, before presenting their petition. If the decree had been enrolled, they could not now file a bill of review; and, it not having been enrolled, a rehearing should not be granted.

Motion denied.

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*Bachelor *v.* Nelson and another. [*449]

Where an order to take proofs was duly entered, but notice was not given within the thirty days required by rule 50, and the examination of a witness was objected to before the Master on that ground, his deposition was suppressed.

It is not a matter of course to allow a deed to be proved at the hearing, but a satisfactory excuse must be given for the failure to prove it before the Master.

The documentary evidence referred to in the 56th rule, has reference to documents which prove themselves. But to entitle a party to use such documentary evidence in any case, there must have been an order entered for taking proofs, to give the opposite party an opportunity of examining witnesses relative thereto, or of introducing countervailing proofs.[1]

[1] See Jerome *v.* Seymour, Harr. Ch., 255; Stone *v.* Welling, 14 Mich., 514.

Bachelor *v.* Nelson.

Motion by defendants to suppress the testimony of one Whipple, a witness examined by complainant; and a cross motion by complainant for leave to prove the execution of a mortgage and deed, at the hearing.

O. Hawkins, for complainant.

J. Allen, for defendants,

The Chancellor. Defendants' motion must be granted. After a cause is at issue by filing a replication, either party may enter an order of course for taking proofs, and serve notice thereof on the opposite party, within thirty days. If neither party, within that time, enter the order and give notice thereof, the cause stands for hearing on bill, answer and replication. Rule 50. In the present case the order was duly entered, but notice thereof was not given within the thirty days, and the examination of the witness was objected to, on that ground, before the Master.

It is not a matter of course to allow a deed to be proved at the hearing. "Examinations at the hearing," says [*450] *Chancellor Kent, "ought to be sparingly used, or they would tend very much to delay and embarrass business, by changing the whole practice of the Court, and giving it a *nisi prius* character." "In my opinion," says he, "no paper whatever ought to be proved at the hearing, without satisfactory reasons being assigned why it was not proved in the regular way, before the examiner." No excuse is shown why the mortgage and deed were not regularly proved, before a Master, except the solicitor's neglect to give notice of the order entered by him for taking proofs.

The 56th rule, which has been referred to, has no bearing on the question. It says, "Documentary evidence, which is neither made an exhibit before the commissioner, or set out, or distinctly referred to in the pleadings, shall not be read on the hearing, unless notice of the intention to use it at the hearing, is given to the adverse party, at least ten days before the expiration of the time allowed to produce proofs," &c. This part

of the rule has reference to documents that prove themselves, and do not require to be proved by witnesses; as exemplifications of records, and the like; and provides that such documents, when *not* set out, or distinctly referred to in the pleadings, shall not be used on the hearing, without having been made an exhibit before the Master, or notice to the opposite party, as required by the rule. Such documents may be read as evidence at the hearing, as a matter of course, by the English practice, which the rule was intended to change, in regard to documents *not* set out, or distinctly referred to in the pleadings, by requiring them to be made exhibits, or notice to be given of the party's intention to use them at the hearing, to prevent surprise. *Pardee* v. *De Cala*, 7 Paige R. 132. But, to entitle a party to use such documentary evidence in any case, there must have been an order entered for taking proofs, to give the opposite party *an opportunity of examining witnesses [*451] relative thereto, or of introducing countervailing proofs. id. 135; *Mills* v. *Pittman*, 1 Paige R. 490.

The concluding part of the 56th rule,—"and no deed or other writing shall be proved at the hearing, except on an order previously obtained, after due notice to the adverse party;"—has reference to deeds and other instruments to be proved at the hearing, and not to documents that prove themselves, to which the preceding part of the rule is alone applicable.

Whipple's testimony must be suppressed, and leave must be refused to prove the execution of the deed and mortgage at the hearing. As it appears, however, the order for taking proofs was entered in time, and notice not given in consequence of solicitor's misapprehension of the practice, he is to be at liberty to enter a new order for taking proofs, at any time within ten days, on paying defendant's costs of opposing the present motion.*

* Note. Rule 56 has since been amended.

[*452] *Pascal D. Webb *v.* Israel Williams *et al.*

Where complainant filed his bill in this Court for relief against a judgment at law, and subsequently sued out a writ of error to the Supreme Court on the judgment, an order was granted compelling him to elect in which Court he would proceed.

On a motion to compel a complainant to elect between prosecuting his suit in this Court, and proceeding on a writ of error in the Supreme Court, for relief against a judgment at law, it is not necessary to serve a copy of the proceedings in the Supreme Court, with the notice of the motion.

Defendants brought an action of ejectment, in the Circuit Court for Washtenaw county, against complainant, for two undivided thirds of the west half of the southeast quarter of section 7, town 4, south of range 6, east, and obtained a verdict and judgment therefor, at the November Term of the Court, in 1842. January 13th, 1843, complainant filed his bill in this Court, and obtained an injunction restraining defendants from taking out execution on their judgment. In January last the injunction was dissolved; and, on the twentieth of March, complainant sued out a writ of error in the Supreme Court, on the judgment, and filed a bond staying execution under the statute. A motion is now made by defendants, for an order requiring him to elect in which Court he will proceed.

J. Allen, in support of the motion.

O. Hawkins, contra.

The Chancellor. The case of *Cockerel* v. *Cholmeley*, 1 Russ. & Myl. R. 418, is in point. In that case, as in this, a bill was filed to restrain defendant from proceeding at law on [*453] a judgment, and complainant, having brought *a writ of error in the House of Lords, it was held he could not proceed at law and in equity, at the same time. That he must either abandon his writ of error, or dismiss his bill.

It was not necessary to serve a copy of the proceedings in

the Supreme Court, with notice of the motion. The notice was sufficient in stating as it did, that the motion would be founded on an affidavit, a copy of which was served, and on the pleadings in the respective causes.

Motion granted.

Brown *et al. v.* Byrne and Ensworth.

It is improper for a Master, to perform any official act, as Master, in a cause in which he is solicitor, or partner of the solicitor.

Motion to set aside Master's sale of mortgaged premises under a decree.

The premises were sworn to be worth $1,300, and it appeared, from the Master's report, they were sold to complainants for $100. It also appeared one of complainants' solicitors, as Master, had advertised the premises for sale, but, being absent on the day of sale, they were sold at his request by another Master, who executed the deed to complainants.

G. Miles, in support of the motion.

W. A. Fletcher, contra.

The Chancellor. It is improper for a Master to perform any official act, as Master, in a cause in which he is *solicitor, or a partner of the solicitor. This, of itself, [*454] is sufficient cause for setting aside the sale, before it has been confirmed. But it appears the mortgaged premises were sold for $100 only, while Ensworth swears they are worth $1,300, and there is nothing before the Court showing he has placed too high a value on them.

Motion granted.

Chauncey Hurlbut *v.* Calvin Britain and Talman Wheeler.

When a replication to a plea is filed, the truth of the plea is the only question to be tried, and if established it is a bar to so much of the bill as it professes to cover.[1]

Bill to foreclose a mortgage, dated June 20, 1839, and executed by Britain to the Detroit City Bank. In December, 1839, the bank was placed in the hands of a receiver, who, on May 28th, 1842, sold and assigned the mortgage and accompanying bond to complainant. Britain interposed a plea, stating that the bond and mortgage in question, with five others of the same date, was given by him to the Detroit City Bank, upon and for the sole consideration and condition that the bank should deposit with the receiver of the Bank of Brest, $8,000 to his credit, and cancel his liabilities at said last named bank, to that amount, or as nearly so as might be. The plea then averred that that the Detroit City Bank did not make such deposit, or cancel his liabilities at the Bank of Brest, to the amount of $8,000, or any other amount. The complainant filed a replication to the plea.

[*455] **A. Davidson*, for complainant.

S. Barstow, for defendants.

The Chancellor. Is the plea proved? When a replication is filed, the truth of the plea is the only question to be tried, and, if established, it is a bar to so much of the bill as it professes to cover. *Fish* v. *Miller*, 5 Paige R. 26; *Bogardus* v. *Trinity Church*, 4 Paige R. 178; *Daws* v. *McMichael*, 6 Paige R. 139.

[1]As to what decree complainant will be entitled to, if found not to be true, see Hurlbut *v.* Britain, 2 Doug. 191.

Brown is the only witness. He is complainant's witness, but his testimony having been taken and read by complainant, defendant is entitled to the benefit of it to establish his plea, although he has examined no witness of his own for that purpose. Brown was cashier of the Detroit City Bank, when the mortgages were given. He says they were given to the bank, on condition he, as the agent of the bank, should deposit with the receiver of the Bank of Brest, $8,000 of the bills of that bank, to the credit of Britain, and cancel that amount of Britain's indebtedness at that bank. He further says that, in July or August, 1839, he deposited the $8,000 with the attorney of the receiver, and took a receipt for it, "and received the assent of the Attorney General to the release of certain bonds and mortgages given by Britain to the Auditor General of the State, to secure the payment of the liabilities of the Bank of Brest." These bonds and mortgages to the Auditor General, for the security of the creditors and bill-holders of the bank, were not Britain's indebtedness at the bank, or debts due from him to the bank. When the arrangement for the bonds and mortgages was entered into, Britain told Brown he was owing the Bank of Brest about $6,000, and that he had been sued for it. This, doubtless, was one of the liabilities that were to be canceled: but neither it, nor any other debt due from Britain *to the Bank of Brest, has ever been paid by the Detroit [*456] City Bank. The $8,000 were not deposited with the receiver to the credit of Britain, or used in paying what Britain owed the bank. The receivers had nothing to do with the bonds and mortgages executed to the Auditor General. He could not discharge them, or enforce their collection. They did not belong to the bank; they composed no part of its assets. The creditors of the bank only could have recourse to them for the payment of their debts, after all other means for enforcing their payment had failed.

The plea being sustained by the evidence in the case, the bill must be dismissed with costs as to both of the defendants; and it is therefore unnecessary to decide the other questions discussed on the argument.

[*457] *Dana Parker *v.* Philomelia D. Parker, Melancthon Smith, Francis H. Blanchard and Timothy A. Sumner.

A plea must be positive, and not on belief, when it states a fact within defendant's knowledge, or touching his own acts, but when it relates to the act of third persons and not to defendant's own act, it may be on information and belief.

In a plea that one of the defendants is a married woman, and her husband is not a party to the suit, it is not necessary to show by the plea she cannot sue and be sued as an unmarried woman, under the eighteenth section of chapter four, title seven, part two, of the revised statutes, where the bill does not make out a case bringing her within the statute.[1]

Bill to foreclose a mortgage.

The bill stated that, on July 25th, 1842, complainant became surety for the defendant Philomelia D. Parker, as endorser of certain promissory notes made and negotiated by her, to the amount of $5,944.73; that she, on the same day, executed and delivered to him a bond in the penal sum of $11,900, conditioned to save him harmless against the payment of said notes, and two mortgages on real estate in Jackson county, as security for the performance of the condition of the bond, which mortgages were acknowledged and recorded; that Philomelia had failed to pay the notes when they became due, and complainant had been compelled to pay, and had paid on them, $4,249.95, which, with interest thereon, from December 31st, 1842, was due and owing to him from the said Philomelia. The other defendants were parties to the bill as subsequent incumbrancers, and pleaded in bar thereof that they had been *informed*, and verily believed, that Walter Damon, late of Reading, in the county Middlesex, and State of Massachusetts, was, at the time of exhibiting the bill of complaint, and [*458] ever since had been, the *lawful husband of the said Philomelia; and that said Walter Damon should have been made a party to the bill.

[1] See Comp. Laws, 1871, § 4805.

Sumner, in support of the plea.

Johnson, contra.

THE CHANCELLOR. The first objection to the plea is that it is not *positive*, but on information and *belief*. Where a plea states a fact within defendant's knowledge, or touching his own acts, it must be positive; but, when it relates to the acts of third persons, to which he is not a party, it is sufficient if it be on information and belief. *Drew* v. *Drew*, 2 Ves. & B. 159; Coop. Eq. Pl. 228.

Another objection is the plea does not show Philomelia, though a married woman, may not sue and be sued as a *feme sole*, by reason of the eighteenth section of Chap. 4, Tit. 7, part 3, of the Revised Statutes, p. 344. The section is in these words:

"When any married woman shall come from any other State or country, into this State, without her husband, he having never lived with her in this State, she may transact business, make contracts, and commence, prosecute and defend suits, in her own name, and dispose of her property, which may be found here, in like manner, in all respects, as if she were unmarried, upon all contracts, and for all other acts, made or done, by her after her arrival in this State; and she may make and execute any deeds and other instruments, in her own name, and do all other lawful acts, that may be necessary or proper to carry into effect the powers so granted to her."

The answer to this objection is, that the bill is not so drawn as to require the defendants, by their plea, to negative the several facts which, under the statute, confer on a married woman the right to sue and be sued, and to make *con [*459 tracts, without her husband. Complainant, in drawing his bill, should have anticipated the plea, and charged the necessary facts to have avoided it under the statute; or, after the plea had been put in, amended his bill within the twenty days allowed by the 32d rule of Court. Having done neither, the plea is sufficient. The record, as it stands, shows Philomelia was a married woman when the bill was filed, and that

her husband is still living, without stating any reason for his not being a party.

Plea allowed, with leave to complainant to amend his bill in twenty days, on paying costs.

Jasper Mason *v.* Rodney C. Payne, The President, Directors and Company of the Farmers and Mechanics' Bank of Michigan, and Jacob Beeson.

Where a part of mortgaged premises has been aliened by the mortgagor, subsequent to the mortgage, the rule in equity, on a foreclosure and sale, is to require that part of the premises in which the mortgagor has not parted with his equity of redemption, to be first sold; and then, if necessary, that which has been aliened: and, where the latter is in possession of different vendees, in the inverse order of alienation.[1]

But where a part of mortgaged premises is conveyed by the mortgagor *subject to the payment of the whole of the mortgage*, that part as between the vendor and vendee constitutes the primary fund for its payment.[2]

A vendee is chargeable with notice of the contents of a deed to his grantor, through which he claims title.[3]

Where a lot of land was conveyed by complainant, subject to the payment of a mortgage on certain other lands, and proceedings were had in chancery to foreclose the mortgage, and the decree became the property of one of the defendants who also purchased the lot on which payment was charged, *it was held*, that such purchase amounted to a satisfaction of the mortgage to the value of the lot so purchased.

[*460] *An application by a party or privy to a proceeding in this Court, to stay such proceeding, must be directly to the Court itself, in the matter of the suit or proceeding, for an order to that effect; and an officer out of Court has no authority to allow an injunction for that purpose. But

[1] See Caruthers *v.* Hall, 10 Mich., 40; James *v.* Brown, 11 id., 25; Cooper v. Bigly, 13 id., 463; McKinney *v.* Miller, 19 id., 142; Ireland *v.* Woolman, 15 id., 253; Sibley *v.* Baker, 23 id., 312; Trowbridge *v.* Harleston, *ante*, 185.

[2] See *In re* estate of Wisner, 20 Mich., 450; Baker *v.* Terrel, 8 Minn., 195.

[3] Fitzhugh *v.* Barnard, 12 Mich., 110; Norris *v.* Hill, 1 id., 202; Case *v.* Erwin, 18 id., 434; Baker *v.* Mather, 25 id., 51.

where the case was such that an order would have been granted, and the objection was not taken on the argument, the injunction was allowed to stand for such order.

MOTION to dissolve injunction on bill and answer.

Jacob Beeson, being the owner of five several lots of land,—say Nos. 1, 2, 3, 4 and 5,—in June, 1834, mortgaged them to George Kimmel for $1,000, payable in five years, with interest; which mortgage was duly recorded. In May, 1836, Beeson sold lots Nos. 1, 2 and 4, to the complainant, Jasper Mason, subject to "*the payment of the whole and entire amount*" of the Kimmel mortgage; and the latter covenanted to pay the mortgage, and to indemnify and save harmless Beeson, his heirs, executors, administrators, and assigns, from any claim or demand on account of it. In August, 1836, Mason sold and conveyed, by warranty deed, lots one and four to Stanton and Hamilton, who purchased without notice, as the answer states, that the conveyance from Beeson to Mason, their grantor, was subject to the Kimmel mortgage. In October, 1840, Payne purchased these lots, viz. one and four, in trust for the bank, as the bill states, and the trust is not denied by the answer. In December, 1837, Mason, being the owner of lot fifty-eight in the village of Niles, mortgaged it to Stanton and Hamilton, and one Walker, who was at that time part owner with them of lots one and four, to indemnify them against the Kimmel mortgage. This mortgage was recorded about the time it was executed. Mason afterwards, in March, 1838, sold lot fifty-eight to Thomas Fitzgerald, subject to the payment of the Kimmel mortgage, which was thereby "*charged upon the said lot of land.*" In August, 1841, Fitzgerald sold it to the bank, subject to the mortgage from Mason to Stanton, *Hamilton and Walker, and a mortgage executed by [*461] Fitzgerald to Cogswell K. Green, which mortgages were to be "and remain as a lien on said premises, according to the true intent thereof, until fully paid and satisfied by the said party of the second part, their successors in office or assigns." On June 27th, 1840, Kimmel obtained a decree to sell the lots mortgaged to him, unless they were redeemed within a given

time, in payment of his mortgage, which decree was assigned by him on December 6th, 1843, to John F. Porter, and afterwards by Porter to the bank. The complainant, who was still the owner of lot No. 2, insisted the bank, as the purchaser of lot fifty-eight from Fitzgerald, was bound to pay the Kimmel mortgage, and that, therefore, the assignment of the decree by Porter to the bank, was, in equity, a satisfaction of the decree; and prayed the bank might be decreed to acknowledge satisfaction of the decree.

C. Dana, in support of the motion.

H. N. Walker, contra.

The Chancellor. The effect of the conveyance from Beeson to Mason, of lots one, two and four, subject to the payment of the whole of the Kimmel mortgage, as between them, was to make these lots the primary fund for the payment of that mortgage; *Cox* v. *Wheeler*, 7 Paige R. 248; *Jumel* v. *Jumel*, id. 591; and the covenant of indemnity was to secure Beeson against any deficiency of the fund.

Where a part of mortgaged premises has been aliened by the mortgagor, subsequent to the mortgage, the rule in equity, on a foreclosure and sale, is to require that part of the premises in which the mortgagor has not parted with his equity of [*462] redemption, to be first sold; and then, if *necessary, that which has been aliened; and, where the latter is in possession of different vendees, in the inverse order of alienation. This rule, however, is inapplicable to the conveyance from Beeson to Mason, as it was made subject to the payment of the Kimmel mortgage, which raised an equity in favor of Beeson to have the lots conveyed by him to Mason first applied in payment of that mortgage, if Mason failed to pay it in pursuance of his covenant. The answer denies Stanton and Hamilton had notice of this equity, when they purchased of Mason. If they had not actual notice, they were chargeable with constructive notice. They could not make out their title to lots one and four, without claiming through Beeson's deed to Mason,

their grantor; and they were, therefore, chargeable with notice of the contents of that conveyance. *Jumel* v. *Jumel*, 7 Paige R. 591; *Harris* v. *Fly*, id. 421; *Moore* v. *Bennett*, 2 Ch. Cas. 246. This conveyance, as I have already stated, as between Beeson and Mason, in equity, charged lots one, two and four, with the payment of the whole of the Kimmel mortgage; so that neither Mason, nor his privies in estate, who are chargeable with notice of its contents, have a right, as against Beeson, to have the Kimmel mortgage paid by a sale of that part of the mortgaged premises not conveyed by Beeson to Mason.

But, as the conveyance from Mason to Stanton and Hamilton was not made subject to the Kimmel mortgage, they would have a right, as against Mason, if they were still the owners of lots one and four, to have lot No. 2, still owned by Mason, first sold to satisfy the decree; and the bank has the same right, unless that right has been displaced by a new equity, between the bank and Mason, growing out of the purchases of lot fifty-eight and the decree by the bank.

*Lot fifty-eight is no part of the premises mortgaged [*463] by Beeson to Kimmel, but was mortgaged by Mason to Stanton, Hamilton and Walker, when they were owners of lots one and four, to indemnify them against the Kimmel mortgage. Mason, to whom it belonged to pay that mortgage, afterwards sold lot fifty-eight to Fitzgerald, "*subject to the payment of the whole of Kimmel's mortgage*," describing the mortgage particularly in the conveyance. This, as between Fitzgerald and Mason, made lot fifty-eight a fund for the payment of Kimmel's mortgage. It was no longer a mere security of indemnity to Stanton, Hamilton and Walker and their grantees, but was charged with the payment of that mortgage. Now, as between a mortgagor and his vendee subject to the mortgage, the mortgaged premises are a primary fund for the payment of the mortgage debt; so, in the present case, as between Mason and Fitzgerald, or his vendee the bank, lot fifty-eight is the primary fund for the payment of the Kimmel mortgage. The bank purchased subject to the Stanton, Hamilton and Walker mortgage, and another mortgage to Green;

and, under the rule above stated, the bank was chargeable with notice of the contents of Mason's deed to Fitzgerald, when it purchased of him. And, as the bank owns both lot fifty-eight and the decree, the latter must be considered as satisfied, if the property is worth, and will sell for enough to pay what is due on the decree; otherwise, it is a satisfaction only so far as it will go towards paying the decree.

The complainant's case was not one proper for an injunction, but for an order staying proceedings in the foreclosure suit, which might have been obtained on application by petition to the Court. In the language of Chancellor Walworth, "an application, by a party or privy to a proceeding in this [*464] Court, to stay such proceeding, must *be directly to the Court itself, for an order to that effect;" and an officer out of Court has "no authority to allow an injunction for that purpose." *Ellsworth* v. *Cook*, 8 Paige R. 643; 2 Paige R. 26. This objection was not taken on the argument; and, an answer having been put in, and the case being one in which an order would have been granted, I shall let the injunction stand in the place of an order.

Motion denied.

[*465] *Peter Morey *v.* Robert A. Forsyth *et al.*

The assignee of a judgment, or *chose in action* on which a judgment has been obtained in the name of the assignor, is not a necessary party to a judgment creditor's bill filed by the assignee.

But where there is a controversy between the assignor and assignee, touching the assignment, the Court will direct the assignor to be made a party for the protection of all.[1]

Where an assignment of a debt is made to defraud creditors, they only can take advantage of the fraud to set it aside, and it is good against all others; and the debtor cannot set it up as a defense to a suit by the assignee.[2]

[1] See Beach *v.* White, *post*, 495; Woodward *v.* Clark, 15 Mich., 104.

[2] See Hess *v.* Final, 32 Mich., 515; McAuliffe *v.* Arner, 27 id., 76.

Morey *v.* Forsyth.

Where the object of a suit is to place trust property in the possession of the trustee, and not to affect the existence of the trust or trust property, the *cestui que trust* is not a necessary party.

Motion for a receiver on a judgment creditor's bill.

The bill was in the usual form, and stated that, in June, 1840, previous to the rendition of the judgment, which was in the name of Joseph W. Brown, the said Brown, for a good, sufficient, and valuable consideration, assigned, sold and transferred to complainant the claim upon, and for the recovery of which, the judgment was obtained; and that complainant was the absolute owner of the judgment so recovered. The answer of Forsyth, the judgment debtor, was read in opposition to the motion. Among other things, it stated, on information and belief, that the assignment from Brown to complainant was made to defraud Brown's creditors. That Elisha S. Avery and Charles Eldredge, in December, 1840, filed a judgment creditor's bill against Brown, and obtained the appointment of a receiver, to whom Brown, on the first of March, 1842, assigned all his property, equitable interests, things in action, money, and effects; and that, on the 27th day of February, 1843, the aforesaid judgment was sold by the *receiver, at public [*466] auction, to Avery and Eldredge. The answer further stated Morey was to pay two hundred dollars out of the demand to the Farmers' and Mechanics' Bank, *if collected.*

H. H. Emmons, in support of the motion.

A. Davidson, contra; who insisted that Brown, Avery and Eldredge, and the Farmers and Mechanics' Bank should be made parties.

The Chancellor. Nothing is more common in practice, than for an assignee of a judgment to file a judgment creditor's bill, without making the assignor a party. At law, as well as in equity, the rights of an assignee of a chose in action are recognized and protected. The assignee, must, however, in most cases, still sue in the name of the assignor; yet he is con-

sidered the real party to the record, and in interest, and what was formerly looked upon by courts of law as a mere equity, is now regarded by them as a legal right; so that there is no longer any necessity for making the assignor a party to a bill by an assignee, with a view of binding the legal interest formerly held to be in the assignor, while the equitable interest only was in the assignee. *Ward* v. *Van Bokkelen*, 2 Paige R. 289. When the assignor has parted with his whole interest in the judgment, there is no more necessity for making him a party to a bill filed by the assignee, than there is for making the mortgagor, who has conveyed his equity of redemption, a party to a bill of foreclosure. If there be a controversy between the assignor and assignee, touching the assignment, the Court will direct the assignor to be made a party for the protection of all; otherwise he need not be a party.

Nor are Avery and Eldredge necessary parties. [*467] *Suppose the assignment was to defraud creditors; they only, and those claiming under them, could take advantage of the fraud. It is good against all others. It cannot be questioned by the debtor of the assignor, whose debt has been assigned, in a suit brought by the assignee against him. Creditors may, or may not, insist upon the fraud, because it works to their injury; but it cannot injure the debtor of the assignor. It is not for the defendant, therefore, to refuse paying the judgment to complainant, because he may think the assignment of it was intended to defraud Avery and Eldredge, who have not, so far as appears from the answer, thought proper to institute proceedings to have the assignment set aside, and the judgment paid to them, or given notice to defendant of their intention to do so, and forbidden his paying the money to complainant. Had they given such notice, it would not be a good defense to the present suit; but would, I am inclined to think, have warranted defendant, for his own protection, in filing a bill of interpleader against complainant and Avery and Eldredge, on bringing the amount of the judgment into Court.

Complainant may be regarded as a trustee of that part of the judgment, viz: the two hundred dollars, to be paid to the

bank when the judgment is collected. The bill is filed to enforce payment of the judgment; not an execution of the trust. It is no part of its object to affect the existence of the trust, or the trust property, except to place it in the hands of the trustee, who cannot, until then, execute the trust. Payment of the judgment only, and not the existence, effect, or execution of the trust, is the prayer of the bill. The *cestui que trust*, the bank, is, therefore, not a necessary party. *Franco* v. *Franco*, 3 Ves. R. 75; *Jones* v. *Goodchild*, 3 P. Wms. R. 32; Calvert Eq. 212, 213.

Motion granted

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*Horatio J. Lawrence *v.* Joseph Fellows *et al.* [*468]

Where a bill is filed to foreclose a mortgage against a non-resident mortgagor, who does not appear, if the mortgaged premises are insufficient to satisfy the debt, the complainant must have recourse to his remedy at law for the balance; and this Court has no power to issue execution thereon.[1]

Petition by complainant for an order vacating an appraisement and set-off of real estate on a *fieri facias*, under the "act to provide for the transfer of real estate on execution, and for other purposes," approved February 17, 1842, and for a sale of the premises on the execution.

E. S. Lee, in support of the motion.

The Chancellor. It appears by the petition the defendants are non-residents; that complainant filed his bill against them, as such, to foreclose a mortgage, procured an order for their appearance, had the same published, and, none of defendants appearing, obtained a decree under the statute regulating proceedings against absent, concealed, and non-resident defendants. R. S. 371. The mortgaged premises were afterwards

[1] See Outwite *v.* Porter, 13 Mich., 533.

sold by a Master, and, not bringing enough to pay what was due on the mortgage, a *fieri facias* was taken out for the balance, and levied on real estate of the mortgagor, which was appraised and set off to the complainant, under the appraisement and set-off law of February 17th, 1842. The complainant, deeming the law to be unconstitutional, and the proceedings had under it null and void,—the defendants never having appeared in the suit,—moves to have the appraisement and set-off vacated, and the premises regularly sold on the execution.

Not only the appraisement and set-off, but the [*469] *execution itself, must be set aside and held for nought, not for the reason urged by complainant, but a different reason, viz: that the execution should never have been issued.

The 105th section of the chapter of the revised statutes relating to this Court, R. S. 376, which gives the Court power to decree and direct the payment by the mortgagor of any balance that may remain due after a sale of the mortgaged premises, and, for that purpose, to issue execution as in other cases, against other property of the mortgagor, as well as the 58th section relating to executions, is inapplicable to proceedings and decrees against non-resident defendants, who have not appeared. Neither of these sections is under the head, "Of proceedings against absent, concealed, and non-resident defendants." The 82d, 83d and 84th sections, which are under this head, provide;—the 82d section, that process shall issue to compel the performance of such decree, (against a non-resident, &c.) either by sequestration of the real and personal estate of the defendant, or such part thereof as shall be deemed sufficient, (to satisfy the decree, when it is for the payment of a sum of money;) or, when any specific estate or effects are demanded by the bill, by causing possession of the property so demanded to be delivered to the complainant. The 83d section provides that possession shall not be delivered, until complainant shall have given such security, and in such sum, as the Court shall direct, to abide the order of the Court touching the restitution of the estate or effects delivered, in case the defendant shall appear, and be admitted to defend the suit. The 84th section

that, upon like security being given, the Court, when a sequestration shall have issued, may order the decree to be satisfied out of the estate and effects sequestered; but, if such security shall not be given, the estate and effects shall remain under the direction of the *Court, to abide its further order. [*470] And the 88th section provides, if the bill shall have been filed to procure the foreclosure or satisfaction of a mortgage, the Court, instead of proceeding to a sequestration in the manner thereinbefore directed, may decree a sale of the mortgaged premises, or of such part thereof as may be necessary to discharge the mortgage and the costs of suit, as in other cases. But no provision is made, in case the mortgaged premises do not sell for enough to satisfy the mortgage debt, for collecting the balance in this Court by execution or sequestration. The 82d section, in speaking of sequestration, has reference to equitable demands only, which cannot be enforced at law, and which the injured party is under the necessity of enforcing in a court of equity. Before any statutory regulation on the subject, the mortgagee could come into this Court for a foreclosure or sale of the mortgaged premises only; and if, on a sale, the mortgaged premises did not bring enough to satisfy the whole debt, he had to sue upon his bond, or other evidence of debt, at law. And, as the statute has not altered the law in this respect, as to non-resident mortgagors who have not appeared, he must still have recourse to his legal remedy against them, for any balance remaining after a sale of the mortgaged premises.

The *fieri facias*, and all proceedings had under it must be set aside, and held for nought; and complainant must have leave to prosecute at law for the balance of the mortgage debt.

[*471] *Ross W. Wood, Alexander H. Grant, and Benjamin B. Wood *v.* Moses B. Savage and Sophia, his wife, Moses Savage, William Savage, and Eurotas P. Hastings.

A settlement after marriage, on a wife, of property belonging to her before marriage, in pursuance of an antenuptial parol agreement, is good against creditors.

Where the property was money, and was to be invested by the husband, whenever a favorable opportunity offered, in the purchase of real estate in the wife's name and for her benefit, and the money was used by the husband in his business without the wife's consent, and was not laid out in pursuance of the agreement until after the expiration of two years, the conveyance to the wife was held to be good against the creditors of the husband.[1]

In November, 1838, complainants obtained a judgment against Moses B. Savage and William Savage, as partners, for $1,852.67 damages, and $21 costs, on which an execution was taken out and returned unsatisfied. They then filed their bill to have their judgment satisfied out of equitable assets, belonging to the judgment debtors; and a store and lot of ground in the city of Monroe, conveyed by the judgment debtors to Moses Savage, their father, in May, 1838; and a farm in Washtenaw county, one undivided half of which was conveyed to Sophia, wife of Moses B., on November 27th, 1837, by one Reighley, and the other undivided half thereof, on June 4th, 1839, by one Phelps. Moses B., having a life estate in the farm as tenant by the courtesy, in May, 1840, conveyed his interest therein, by quit-claim deed, to Moses Savage. The bill charged that this last conveyance, and the conveyance of the store and lot in Monroe, were made to defraud the creditors of Moses B. and William Savage; and that the deeds from Reighley and Phelps for the Washtenaw farm, were taken in Sophia's name for a like purpose.

[1] Reversed in 2 Doug., 316. See Westbrook *v.* Comstock, *ante*, 314. note.

*The defendants answered severally, denying the fraud [*472] with which they were charged, or any intention to defraud the creditors of Moses B. and William Savage. The following facts, also, appeared in the case. The consideration paid by Moses Savage for the property in Monroe, was $800 cash. Moses B. and William were, at the time, in want of money to pay some honorable or confidential debts; and the whole of the $800 was used by them for that purpose. The consideration paid for Moses B.'s life estate in the Washtenaw farm, was $700. This was also paid in cash to Moses B., and the money used by him in paying his individual debts, and the debts of the firm of M. B. & W. Savage. The Washtenaw farm was purchased with the money of Sophia, under the following circumstances. Moses B. and Sophia were married, in October, 1835, in the city of New York, where Sophia then resided. She was at that time a widow, and had one child; and, having $1,500 of her own, mostly in cash, it was agreed between Moses B. and her, on the evening of the day preceding their marriage, that he should take the $1,500, and invest it in real estate in Michigan, whenever a favorable opportunity offered, in her name, and for her benefit; and a part of the money was then handed to him, and the balance of it in a short time after their marriage. In November, 1837, Moses B., with the assent of his wife, purchased for her an undivided half of the Washtenaw farm, of Reighley, for $1,050, and paid for it; and, in June, 1839, the other half of the farm, with her approbation and consent, was purchased for her of Phelps, for $1,500, of which $500 was paid, and the balance secured by a mortgage from her to Phelps, and her promissory notes, signed by Moses B., as her surety. The notes and mortgage had not been paid.

*A. *D. Fraser* & A. *Davidson*, for complainants. [*473]

Moses B. Savage became entitled, immediately upon his marriage with Sophia, to all of her personal property, and such *choses in action* as should be reduced to possession; and the money claimed by her as a trust fund for her benefit was in this situation. Reeve's Dom. Rel. 1, 161; Clancy's Rights

of Married Women, 1; Co. Litt. 112, *b;* 8 Mass. R. 99, 229; 7 Pick. R. 65; 8 Pick. R. 218; 12 Pick. R. 173. And equity cannot settle the wife's property upon her, after it has been reduced to possession by the husband. 2 McCord Ch. R. 40; 1 Eq. Dig. (Barb. and Harr.) 233. The promise of Moses B. to make the settlement, being a parol promise, could not, under the statute of frauds, create him a trustee, in such manner as to sustain a settlement made long after, when he was embarrassed, and owing the debt for which this suit is brought. 1 Story Com. on Eq. 366–7; 1 Strange R. 236; 2 Lev. R. 146; 3 J. C. R. 488; 1 J. C. R. 343; Laws 1833, 302; 4 J. C. R. 45; 1 Pet. R. 460; 12 Serg. & R. 448; 3 Dessaus. R. 230; 2 Nott & McCord R. 544.

The deed by Moses B. to his father, of the life estate of the former in the Washtenaw farm, is fraudulent. A party can *assign*, but cannot *sell*, such an interest.

The deed of the Monroe property should be set aside for inadequacy of consideration.

H. N. Walker, for defendants Sophia and Moses Savage.

The rights of Sophia Savage are derived from a purchase made in pursuance of an antenuptial contract for a good *and valuable consideration other than marriage*, and with money furnished by the wife *before marriage*. Such a contract might be *enforced* against a husband in equity; and [*474] being executed cannot be set aside. Reeve's Dom. R.*174, *et seq.;* 2 Paige R. 303. And a husband has a right to make a reasonable settlement, even although there may be creditors at the time. 2 P. Wms. R. 694. A clear distinction is taken in all the cases, between settlements made in consideration of *marriage only*, and others. 6 Ves. R. 759; 17 Ves. R. 271; 9 Ves. R. 193; 2 Ves. R. 18; 3 J. C. R. 494. The The case of *Taggert* v. *Talcott*, 2 Edw. Ch. R. 628, is very similar to this. The portion of the property purchased from Reighley was bought before the complainants obtained their judgment, and is not affected by any claim of theirs, even if such claim could affect the rest.

The statute of frauds in existence when this agreement was made, applies only to promises *upon consideration of marriage, &c.* Laws 1833, 342.

The Chancellor. Regarding the purchase of the Washtenaw farm as a performance of the antenuptial parol agreement, and in the light of a settlement, after marriage, of the wife's property on her, in pursuance of such agreement, the question is, whether or no such settlement, made after marriage, and having nothing but the antenuptial parol agreement to support it, was fraudulent and void against the then existing creditors of the husband.

The complainants were creditors of the husband, when Phelps' undivided half of the farm was purchased, if not when the first purchase was made of Reighley.

The case of *Reade* v. *Livingston*, 3 J. C. R. 481, is relied on as authority against the validity of such settlements, as to existing creditors. The point, however, was not decided in that case, nor was it necessary to decide it. Chancellor Kent discussed it at some length, and intimated an opinion adverse to the validity of such settlements; but he decided there was no antenuptial contract proved, and held the settlement void in that case, on the ground of *its being voluntary, and made after marriage, by a [*475] party indebted at the time. The only difficulty he found in sustaining such settlements, was the statute of frauds. He admits that prior to the statute, such settlements were held to be good; and refers to *Griffin* v. *Stanhope*, Cro. Jac. 454, and Sir Ralph Bovy's case, 1 Vent. R. 193, in which a "settlement after marriage, in pursuance of a prior parol agreement was held good." "But," he says, "these were cases prior to the statute of frauds (29 Charles II.) which renders void all promises in consideration of marriage; and, therefore, since the statute, it has been determined that the agreement, to be valid, must be in writing;" and refers to the case of *Montacute* v. *Maxwell*, 1 Str. 236; 1 P. Wms. R. 618. That was a bill by a wife against her husband, for a settlement of her property

on her, in pursuance of an antenuptial agreement. It was, therefore, a case clearly within the statute; but is has no bearing, that I am able to discover, on the question. It is one thing to decree the specific performance of a parol agreement, and another to declare such agreement, when executed, fraudulent and void. The statute requiring such agreement to be in writing, it seems to me, does not require such a construction. It was not made for the benefit of creditors, as the statute against fraudulent conveyances, but to prevent perjury, and secure more circumspection in entering into certain classes of contracts. In *Dundas* v. *Dutens*, 1 Ves. R. 196, Lord Thurlow was of opinion such settlements were good against creditors.

Such a settlement cannot be regarded as a voluntary settlement after marriage. The parol agreement, which the husband was morally, and in conscience, bound to perform, is a sufficient consideration to sustain the settlement. Such was the opinion of Lord Parker, who decided the case of *Montacute* v. *Maxwell*. In the language of *Chancellor Kent, "he thought, however, that if the husband, after marriage, had in writing admitted the former agreement, it might have been material, and a sufficient consideration to support a subsequent promise in writing." In many cases at law, a moral obligation, as contradistinguished from a legal liability, has been held a sufficient consideration to support a promise and why not in equity, not to support a naked promise, but performance? If the agreement had been reduced to writing, this Court would, after the marriage, on a bill filed by the wife, have compelled the husband to lay out the $1,500 in real estate for her.

[*476]

By the statute in existence when the marriage took place, (Laws of Michigan, 1833, p. 342, § 10,) no action could be brought, whereby to charge any person, upon any agreement made in consideration of marriage, unless such agreement, or some note or memorandum thereof, was in writing, and signed by the party to be charged therewith, or some person by him authorized. This part of the statute has no reference to cred-

itors, who are not mentioned in connection with the contracts required to be in writing; much less does it declare such contracts, when not in writing, fraudulent and void against creditors. As I have already stated, it was not made for the benefit of creditors, but for an entirely different object. The husband having, of his own accord, done what he was morally bound to do, and what the Court, but for the statute, would have compelled him to do,—shall what he has done be declared fraudulent and void? I know of no case going this length; and it would, it appears to me, be a strange doctrine for a court of equity to advance, that an act, which a party was in conscience bound to do, was at the same time fraudulent and void as to creditors.

Moses B. says he was solvent, and worth between four *and five thousand dollars, when he was married; and [*477] that the fifteen hundred dollars were not immediately invested, as real estate was at the time rising in value, and could not be purchased on favorable terms. In November, 1837, two years after the marriage, the Reighley half of the farm was purchased, and paid for. This was a year before complainants obtained their judgment. In June, 1839, the other half was purchased of Phelps, $500 paid, and a mortgage executed by Sophia, and promissory notes by her and her husband, for the balance of the purchase money, which is still unpaid, and a lien upon the farm. I see nothing to induce a belief the farm was not purchased in good faith, and in execution of the antenuptial agreement. The fact that the $1,500 was used by the firm of M. B. & W. Savage, in their business, until a favorable opportunity offered for investing it in real estate, is no evidence of fraud, or of a determination on the part of Moses B. not to keep his agreement with his wife. It was used without the consent or approbation of Sophia.

As to the property in Monroe, it was sold to Moses Savage, to enable M. B. & W. Savage to pay a confidential debt. It was sold for $800, cash, at a time of great pecuniary distress, when money was scarce, and real estate a drug that could hardly be sold for cash at any price. The witnesses examined to prove its

value at the time, state it was worth a thousand dollars in cash. Conceding this point, the inadequacy of price is not sufficiently great to warrant an inference of fraud. More especially, as fraud is unequivocally denied; the $800 was paid in cash, and went to pay the debts of the firm; and Moses B. states he then believed himself solvent, and able to pay all his debts.

No question is made as to the adequacy of the price paid for Moses B.'s life estate in the farm.

[*478] *The bill must be dismissed, but without costs, against all the defendants except Moses B. and William Savage; against whom it may be necessary to retain it until the receiver's account of the property that has come into his hands is settled.

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James Bailey *v.* Amos Gould.
Amos Gould *v.* James Bailey.

Anything done by a first mortgagee to the prejudice of a second mortgagee, with a knowledge of the second mortgage, should, to the extent of such injury, postpone the first to the second mortgage.[1]

A creditor may extend the time for his debtor to pay in, without discharging the sureties, if he, by the same agreement, in express terms, reserves his remedy against them.

Where the holder of a mortgage released a note which was given with it, reserving at the same time his right to foreclose the mortgage on the land, and a second mortgagee, with notice of the first mortgage, had, prior to the release, foreclosed his own mortgage at law, and purchased the premises, the latter was held to stand in the place of a purchaser of the equity of redemption subject to the first mortgage, and the premises in his hands, as such purchaser with notice, to be the primary fund for the payment of the first mortgage.

Where a foreclosure bill did not state that anything was due on the note executed with the mortgage, or whether any proceedings had been had at law for the recovery of the debt, it was held to be demurrable.

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[1] See James *v.* Brown, 11 Mich., 25; Trowbridge *v.* Harleston, *ante*, 185.

The law does not raise a presumption of non-payment, but of payment when due, unless the contrary is shown by production of the note, or other evidence repelling the presumption of law when the note itself cannot be produced.[1]

The assignment of a mortgage, without the debt which it is given to secure, carries no beneficial interest in the mortgage to the assignee, who would hold it subject to the will and disposal of the creditor.[2]

*Original and cross bills. [*479]

The first is filed for the foreclosure of a mortgage on forty acres of land, executed by Cyrus Miller to Laura W. Whitney, on the 25th of October, 1838, for the payment of $529.20, with interest, by the first day of January, 1841, for which amount a promissory note was at the same time executed by Miller. Miller afterwards, in December, 1838, mortgaged the same premises, with an additional forty acre lot, to Amos Gould, for the payment of $670.50; one half, with interest, on the first day of June, 1839, and the other half, with interest, on the first day of June, 1840. This last mortgage was recorded on the first day of January, 1834, and before the Whitney mortgage, which was recorded on the twenty-eighth day of September of that year. The original bill states that Bailey, on the seventeenth of April, 1841, was appointed guardian to Charles Whitney, Morlan E. Whitney, and Willard Whitney, infants under the age of fourteen years, by the Probate Court of Oakland county; and that, on the same day, Laura W. Whitney assigned to him, as guardian of said minors, and for their benefit, the sum of $278.78, part and parcel of the moneys secured by said mortgage; and, in consideration of $348.94, paid to her by complainant, she then and there assigned to him all her interest in the balance of said mortgage, for his

[1] See Young *v.* McKee, 13 Mich., 552.

When payment is an issue made affirmatively by the debtor, the burden of proof thereof is on him. Adams *v.* Field, 25 Mich., 16.

[2] A quit-claim deed of the mortgaged premises by the mortgagee may operate as an assignment. Niles *v.* Ransford, 1 Mich., 338; Thayer *v.* McGee, 20 id., 195.

See, also, Gilbert *v.* Cooley. *post.*, 494.

As to indorsement of note not being necessary when there is a formal assignment of the mortgage, see Pease *v.* Warren, 29 Mich., 9.

own use. The bill further states that Gould had foreclosed his mortgage at law, by advertisement and sale under the statute; that the mortgaged premises were purchased by him; that the time of redemption had expired and the sale had become absolute; and charges him with notice of the mortgage to Mrs. Whitney, when Miller mortgaged to him.

The defendant in his answer denies all knowledge of the Whitney mortgage when he took his mortgage. He also [*480] denies all the other material facts stated in the bill, *and leaves complainant to prove them, except such as relate to his own mortgage, and the foreclosure thereof at law, which are admitted. And he insists it does not appear from the bill, that the note, to secure the payment of which the Whitney mortgage was given, has not been paid; or that it passed to complainant on the assignment of the mortgage; or that it is in existence as an outstanding claim against Miller; and claims the same benefit from his objections as though he had demurred to the bill.

A replication was filed, and testimony taken by both parties; and, in order to make Miller a witness, to prove notice to defendant of the Whitney mortgage, the following release was executed to him by complainant:

"Know all men by these presents, that I, James Bailey, of Troy, in the county of Oakland, in the State of Michigan, in consideration of one shilling to me in hand paid by Cyrus Miller, the receipt whereof I hereby acknowledge, do by these presents covenant, for myself, my heirs and assigns, that I will not, and they shall not, sue, prosecute, or collect from said Miller, his heirs or assigns, a certain promissory note made by said Miller to Laura W. Whitney, for the sum of five hundred and twenty-nine dollars and twenty cents, and interest, dated October twenty-fifth, in the year eighteen hundred and thirty-eight, and payable on or by the first day of January, in the year eighteen hundred and forty-one. And I also further covenant that I will not, and my heirs, executors, administrators and assigns shall not, sue, prosecute, or collect from said Miller, his heirs, administrators, or assigns, the whole or any

part of the sum of money and interest mentioned in said note, by virtue of, or by any action upon, a certain covenant to pay the said sum, made by said Miller, in a certain indenture of mortgage bearing even date with said promissory note, and executed by said Cyrus Miller to said *Laura W. Whit- [*481]
ney, to secure the payment of the same, and, together with the said note, assigned to me by said Laura W. Whitney, on the seventeenth day of April, in the year eighteen hundred and forty-one; hereby releasing and discharging the said Cyrus Miller, his heirs and assigns, from all personal liability on said promissory note and covenant.

"Provided, nevertheless, that nothing herein contained shall be so construed, as to invalidate the said mortgage, and the lien or security of the same upon the mortgaged premises, or to prevent the foreclosure and sale, or set-off of said premises, for the amount of said promissory note and interest, in equity, or under the statute in such case made and provided. In witness whereof I have hereunto set my hand and seal this twelfth day of December, A. D. 1842.

James Bailey, [L. S.]

In presence of *George F. Porter*."

Gould afterwards filed a cross bill, setting forth the release and insisting upon it as a discharge of the mortgage, to which Bailey demurred; and the two bills were brought to a hearing —the original bill on the pleadings and proofs, and the cross bill on the demurrer.

J. F. Joy, for Bailey.

E. B. Harrington, for Gould.

THE CHANCELLOR. I shall first dispose of the cross bill: for, if that can be sustained, there is an end of the original bill.

The release does not in terms discharge the debt. The personal liability of Miller on the note, and on the covenant in the mortgage for the payment of the debt, is released, while the

right to collect the debt by a foreclosure of the mort-
[*482] gage, at law, or in equity, is in express *terms reserved.

Nothing is more clear than the intention of the parties to the release, that Bailey should look to the mortgaged premises alone for payment. But it is said Gould, as subsequent mortgagee, (and as to the cross bill he must be considered in that light, or rather in the light of a purchaser under a foreclosure of a second mortgage with notice of the first,) should be regarded as standing in the place of a surety. That on redeeming the prior mortgage, he would by the rights of subrogation, be entitled to the note as well as the first mortgage: and that the release would cut off his personal remedy against the mortgagor on the note.

Any thing done by a first mortgagee to the prejudice of a second mortgagee, with a knowledge of the second mortgage, should, to the extent of such injury, postpone the first to the second mortgage.

If Gould were a surety so far as regarded his mortgage, in the strict sense of the word, he would not be discharged by the release; because the remedy against him, that is the land, is expressly reserved. It was decided, in *Clagett* v. *Salmon*, 5 Gill & John. R. 314, a creditor might extend the time for his debtor to pay in, without releasing the sureties, if he, by the same agreement, in express terms, reserves his remedy against them. The case was appealed, and the appellate Court, in affirming the decree of the Chancellor, say, "But if the creditor reserves his remedy against the sureties, in the contract he makes with the principal debtor, the debtor thereby tacitly consents to forego, or waive, the benefit of such contract, in case the creditor should afterwards find it necessary to resort to the sureties, for the full and complete extinguishment of his debt."

But there is another view of the case. Gould had foreclosed his mortgage at law, before the release was given.
[*483] *He was not at that time a subsequent mortgagee. He had previously changed his character of mortgagee for that of purchaser at the mortgage sale. Now, if, when he took

his mortgage, he had notice of the Whitney mortgage, although his mortgage was first recorded, that can avail him nothing, and he stands in the place of a purchaser of the equity of redemption under the second mortgage, subject to the first mortgage; and the premises in his hands, as such purchaser with notice, are the primary fund for the payment of the first mortgage. *Coxe* v. *Wheeler*, 7 Paige R. 248. The release, therefore, could work no injury to him. The cross bill must be dismissed with costs.

As to the original bill. It is insisted Miller is an interested witness, notwithstanding the release, as the mortgage to Mrs. Whitney contains a covenant of warranty, from which he is not released. The question is not one of title in the mortgagor, for both parties admit his title, and claim under him, but of priority under the registry laws, with which the covenant of warranty has nothing to do.

The bill was clearly demurrable, in not stating that anything was due on the note executed with the mortgage, or whether any proceedings had been had at law for the recovery of the debt, as required by the statute. Nor is this all. Aside from the question of notice or no notice, complainant has not made out such a case as to entitle him to a decree. The promissory note is not in evidence, and, for aught that appears from the testimony, it may have been paid. The law does not raise a presumption of non-payment, but of payment when due, unless the contrary is shown by the production of the note, or other evidence repelling the presumption of law, when the note itself cannot be produced. Nor is there any evidence of an assignment of the note or debt to complainant. The assignment is of "all my right, title, and interest, or claim, *to the [*484] within mortgage." No mention whatever is made of the debt or note. The assignment set forth in the bill is altogether different from the one proved. The assignment of a mortgage, without the debt which it is given to secure, carries no beneficial interest in the mortgage to the assignee, who would hold it subject to the will and disposal of the creditor. 4 J. C. R. 43.

As to the question of notice, the evidence is conflicting, so much so, that I have not been able to satisfy myself on which side the truth lies. If this were the only point in the case, I should be disposed to award an issue and have the witnesses orally examined in the presence of a jury, that more light might, if possible be elicited. As it is, the original bill, as well as the cross bill, must be dismissed with costs, but without prejudice.

[*485] *Joseph H. Peck *v.* Austin Burgess *et al.*

Where a plea had been filed to an original bill, and complainant amended his bill, and defendants answered the *amendments, it was held*, that the plea was superseded by the amended bill, and a motion to take it from the files for irregularity was denied, the proper motion being to take the answer to the amendments from the files.

Motion to take a plea of the defendant, Burgess, from the files, because it was not sworn to.

C. W. Lane, in support of the motion.

Buckbee, contra.

The Chancellor. Defendant pleaded his discharge under the bankrupt law, in bar of complainant's bill. Thereupon complainant amended his bill, and served a copy of his amendments on defendants' solicitor, and defendant put in an answer to the amendments. Complainant now moves to have the plea taken from the files; and rests his motion on the fact the plea is not sworn to. By amending his bill, as he had a right to do, under the 32d rule, he admitted the validity of the plea; and the amended bill standing in the place of a new bill, the plea was no answer to it. The plea was superseded by the new or

amended bill, to which the defendant had the same time to plead, answer, or demur, that he had to the original bill. Instead of putting in an answer to the amendments only, which would have been the proper course if defendant had filed an answer to the first bill, he should have demurred, or put in a plea or answer to the amended bill, the same as if no plea had been filed by him. The motion should have been to take the answer to the *amendments* from the files, for irregularity, and not the plea.

Motion denied.

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*Arthur Bronson *v.* Cogswell K. Green. [*486]

Where no answer had been put in to an injunction bill, leave was granted to amend so as to waive an answer under oath, on payment of costs.[1]

Motion to amend an injunction bill, so as to waive answer under oath, no answer having been filed.

J. F. Joy, in support of the motion.

S. Barstow, contra.

The Chancellor. When this motion was first made, it occurred to me complainant should have waived the answer under oath, when he filed his bill, and, not having done so, that he had made his election to proceed in the ordinary course, and could not afterwards avail himself of the right given by the statute. But this does not appear to be the construction given to the statute; for, after answer, complainant may dismiss his bill, and file a new bill, waiving defendant's oath. *Burras* v. *Looker*, 4 Paige R. 227. Such being the case, the only effect

[1] See Bank of Michigan *v.* Niles, *ante*, 398.

of denying the motion would be to drive complainant to dismiss his bill and file another, at the expense of paying the costs of the present suit. Justice does not require the adoption of so rigid a rule, in the practice of the Court.

Motion granted, on paying $5 costs to defendant for opposing it.

[*487] *Payne and Payne *v.* Paddock and Paddock.

Where complainants had agreed to allow defendants to draw water for running a mill from a certain lake, the outlet of which flowed through complainants' lands, and had suffered them to go on and construct a mill and race at an expense of three thousand dollars, before informing them they did not intend to abide by their promise, an injunction, which had been granted to restrain the taking of the water of the lake for the mill, was dissolved.[1]

Motion to dissolve injunction on bill and answer. The facts necessary to understand the case are set forth in the opinion of the Court.

M. L. Drake and O. D. Richardson, in support of the motion.

For all the purposes of this motion, the answer must be taken to be true. The complainants stood by, saw the defendants making their mill, race, &c., and encouraged them in so doing, by their promises to release the right to use the water, and to aid them by donations in making the improvements, and by actually helping to raise the mill; and never objected until about the time the works were completed. Then, after having led the defendants on to make these large outlays, and about the time the mill was put into operation, the complain-

[1] See Truesdail *v.* Ward, 24 Mich., 117; Meister *v.* Birney, id., 435.

ants object, and demand $500 for the right to use the water. These facts show there is no equity in the bill; and they bring the case within the principle of *Eldred* v. *Mack*, Harr. Ch. R. 164. See also the case of *Roberts* v. *Anderson*, 2 J. C. R. 204.

This is a case where the Court would decree a specific performance in favor of the defendants, that the complainants should give them a release; defendants having taken
*all the possession of which the subject matter was capa- [*488]
ble, made large expenditures, put up a good mill, &c.,
the complainants looking on, and assisting. The refusal to perform under these circumstances is a *fraud* upon the defendants, and in such cases the Court will decree a specific performance. Story Eq. Pl. 594; Coop. Eq. Pl. 257; 9 Ves. R. 516; 2 Ves. & B. R. 259; 1 Madd. Ch. 299; *Morris* v. *Knickerbacker*, 5 Wend. R. 638. And, where such performance would be decreed, an injunction will be dissolved.

If complainants have any remedy, it is at law, for damages, and fully adequate.

S. M. Green, contra.

The Chancellor. The injunction must be dissolved. Before defendants commenced erecting their mill, they asked the privilege of taking the water from Strait's lake; which complainants promised to let them have, as they considered the building of the mill would be worth more to them than their right to the water of the lake. On this understanding defendants commenced erecting their mill and digging the race; and, after they had expended some three thousand dollars, and had nearly completed their works, they received a written notice from complainants forbidding their taking the water from the lake, by means of their race, and thereby diverting it from the outlet of the lake. The three thousand dollars expended must be a total loss to defendants, if the injunction is permitted to stand, unless they can purchase the right to the water of complainants, through whose land the outlet of the lake

passes. If they had placed themselves in this situation through ignorance of their own rights, or a disregard of the rights of others, however great their loss, they would have no one to blame but themselves. But, while a court [*489] *of equity will freely give its aid to protect an individual in the full enjoyment of his own rights, against the aggressions of another, it will not knowingly assist him in taking an undue advantage of another. Hence the equitable maxim, he who seeks equity must do equity. Complainants permitted defendants to go on upon the understanding had between them, and expend this large sum of money, and then forbade their taking the water from the lake, and applied to this Court for an injunction to restrain them. From the first of January to the eighteenth of June, when they gave the written notice, they knew defendants were going forward with the erection of their mill and, for that purpose, expending large sums of money. They resided in the immediate vicinity of it, and saw the work progress from day to day, and were present and assisted in raising the frame of the mill on the twenty-fifth of May, without notifying defendants they did not consider themselves bound, by the promise they had made, and of their intention to disregard it.

These facts are stated in the answer, and are not, all of them, strictly responsive to the bill, and defendants will be required to prove them at the hearing ; yet, I think, under the circumstances of the case, the injunction should be dissolved. Had an order to show cause against the allowance of the injunction been granted, and the defendants appeared, and showed for cause the facts stated in their answer, the injunction would not have been allowed. In *Jacox* v. *Clark*, *ante* 249, a case resembling the present in several particulars, the injunction was dissolved under somewhat similar circumstances.

Injunction dissolved.

*Henry W. Taylor, George T. Gilbert and [*496] Catharine W. Fitch, Trustees &c. of Jabez S. Fitch, deceased, *v.* Andrew Snyder, Clark Snyder, and Charles G. Hammond, Auditor General.

Where F. sold a piece of land by warranty deed to C. and took back a mortgage, and; after his death, the land was advertised to be sold for taxes levied before the sale to C., and the executors and trustees of F. attended the sale for the purpose of purchasing the land, and thereby saving, as they supposed, a foreclosure of the mortgage, but were prevented from doing so by the fraudulent conduct of S., against whom they filed their bill, *it was held*, that C. need not be a party.

It was also *held*, that it was not necessary to offer in the bill to refund the money paid by S. for the tax title fraudulently obtained by him.

Where the bill prays an injunction, but it is omitted in the prayer for process, it is a good ground for refusing an injunction, but not for dissolving it when it has been allowed.

Motion to dissolve injunction for want of equity in the bill.

The bill was filed by complainants as trustees and executors of Jabez S. Fitch, deceased, and stated that, in his lifetime, Fitch, being seized, in fee simple, of the east half the northwest quarter of section number twelve, in township number one south, of range number five west, on or about the fourteenth day of November, 1839, agreed with one Thomas L. G. Conant to sell him said land, with certain other real estate in Calhoun county, for which Conant was to pay him, at the expiration of one year, two hundred and fifty dollars and interest at the rate of ten per cent, to be secured by a mortgage and promissory note. That Fitch, and complainant, Catharine W. Fitch, his wife, accordingly executed a warranty deed to Conant, who gave the note and mortgage as agreed upon; which mortgage was duly recorded. That the amount so *secured was due, and no part thereof had been paid, [*491] and no proceedings had been had to collect the same.

That the lot was advertised to be sold on October 2d, 1843, for the taxes of 1838, and that complainants appeared at the sale, by their agent, Charles T. Gilbert, for the purpose of bidding it in, to save the expense and trouble of foreclosure; and that, in their opinion, the land was worth no more than the amount due on the mortgage. That Charles T. Gilbert publicly stated his object in the hearing, among others, of the defendant, Andrew Snyder, who well knew of the existence of the mortgage, and that it was unpaid. That Andrew Snyder bid on said lot at the sale, and offered to pay the taxes for the sixteenth part of an inch of the land; and the same was struck off to him. That he neglected to pay for several days, and, on the 9th day of October, the day before the sales closed, it was again put up, in the absence of said Charles T. Gilbert, and bid off by one Walter Martin, in the name of Clark Snyder, the brother of Andrew. That the said Charles T. Gilbert, on the day after the first sale, called at the treasurer's office to pay the taxes, in case Andrew Snyder had not paid them, and was informed that said Andrew would pay them; and he then informed the treasurer, or his clerk, of his willingness to pay the taxes, in case the said Andrew should neglect to do so. The bill charged that the defendant, Clark Snyder, never authorized the bid in his name; that his name had been returned to the Auditor General as purchaser of the land, but no deed of it had as yet been given to him or any one. That the purchase was made by the direction of Andrew who paid the money, and that it was made in the name of Clark Snyder to deceive and defraud complainants; the said Andrew intending to obtain a conveyance from said Clark, who never authorized the purchase in his name, or otherwise.

[*492] **E. Bradley*, in support of the motion.

Fitch conveyed by warranty deed to Conant, on November 15th, 1839, and was bound to pay the tax for which the land was sold. He who asks equity must do equity. In violation of this principle, complainants appeared at the tax sale, to bid in the premises and save the expense of a foreclosure,

when the land was being sold for a tax they should have paid. Conant who is still the owner of the land for aught that appears, should be a party. There is no offer in the bill to refund to A. Snyder the tax paid by him. An injunction is not asked in the prayer for process. Where an injunction is prayed for in the prayer of the bill, but is omitted in the prayer for process, an injunction will be refused. 1 Barb. Ch. Pr. 617; *Wood* v. *Beadle*, 3 Sim. R. 273.

Wm. H. Brown, contra.

The Chancellor. The bill is filed to have the tax sale declared fraudulent and void; and not to foreclose the mortgage. The tax was a lien on the premises, when Fitch, by warranty deed, conveyed them to Conant, and took from him the mortgage. It belonged to Fitch, in his lifetime, to pay the tax: and to complainants, after his death, as the devisees and trustees of his estate. Had they purchased the premises at the tax sale, as they designed doing, and probably would have done but for the gross imposition practised upon them by A. Snyder,—for the bill on the present motion, must be taken to be true in all respects,—this Court would not permit them to use the tax title to defeat Conant's title under their devisor. On the contrary, it would presume that they had purchased the tax title to prevent a failure of Conant's title, and to *protect themselves against a breach of their devisor's covenant of warranty. Neither would it have superseded the necessity of their foreclosing the mortgage, to cut off Conant's equity of redemption, as they supposed. [*493]

Complainants have an interest in sustaining Conant's title, aside from the mortgage. If no mortgage had been given, as devisees, they would be liable, so far as they have property from their devisor, for a failure of Conant's title. Whatever interest Conant has in the present suit is consequential, not direct. Andrew Snyder was guilty of no fraud as to him. Conant did not offer to pay the tax; nor was he present at the sale, and prevented from purchasing the tax title, for the better security

of his own title, by the unwarrantable conduct of A. Snyder. And, should complainants fail in the present suit, and he in the end be ousted by the tax title, his remedy against them on the warranty would still be good. He is not therefore, we think, a necessary party to the present proceedings.

The case made by the bill is one of actual, not constructive fraud; and, if sustained, defendants must lose what they have paid. *How* v. *Camp*, *ante* 427. Equity will not protect them against the consequences of their own fraudulent conduct.

Where the bill prays an injunction, but it is omitted in the prayer for process, it is a good ground for refusing an injunction, but not for dissolving it after it has been allowed.

Motion denied, with $5 costs.

[*494] *Joseph T. Gilbert *v.* Warren Cooley *et al.*

Although a statutory foreclosure be irregular, and no bar to the equity of redemption, yet the purchaser at such sale succeeds to all the interest of the mortgagee.[1]

Where complainant, after a statutory foreclosure of a mortgage, filed his bill in this Court to foreclose the same mortgage, alleging the statutory foreclosure to have been invalid, and obtained an injunction, it was dissolved on the ground that he had no longer any interest in the mortgage or mortgaged premises, and that the purchaser at the sale, or his grantees, should have filed the bill.

Motion to dissolve injunction for want of equity in the bill, by complainant, as surviving partner of the firm of Fitch & Gilbert.

The bill was filed to foreclose a mortgage; and stated that no *valid* proceedings had been had to collect the same. That certain irregular and invalid proceedings had been taken in

[1] See Hoffman *v.* Harrington, 33 Mich., 392; Richards *v.* Morton, 18 id., 255; Niles *v.* Ransford, 1 id., 338; Bailey *v.* Gould, *ante*, 478.

attempting to foreclose it under the statute, and that the premises had been under such proceedings advertised and sold to one Charles T. Gilbert, who had subsequently deeded to others. That the irregularity in the proceedings under the statutory foreclosure consisted in a mistake in the description of the premises, the word "North" being used, instead of "South," to designate the township wherein it was located. That defendants harrassed and obstructed the present occupants, who were the grantees of Charles T. Gilbert, in the possession of the property, and threatened proceedings at law to evict them. Prayed a foreclosure and sale, and that defendants might be enjoined from committing waste, and proceeding at law, &c.

E. Bradley, in support of the motion.

W. H. Brown, contra.

*The Chancellor. It is not necessary on this motion [*495] to inquire into the validity of the statutory foreclosure. Conceding it to be irregular, and no bar to the equity of redemption, the sale and sheriff's deed transferred Fitch and Gilbert's interest in the mortgage to Charles T. Gilbert, the purchaser. *Jackson* v. *Bowen*, 7 Cow. R. 13. Whatever interest they had in the mortgage at the time of sale, he now has; and he, either alone, or in connection with his subsequent grantees, should have filed the bill; and not the complainant, who has no interest in the mortgage or mortgaged premises. C. T. Gilbert is not a party.

Injunction dissolved, with $5 costs.

Elisha Beach and Charles Williams *v.* Jonathan R. White, Louisa D. White and Phineas White.

A judgment creditor's bill cannot be sustained to reach equitable assets or choses in action, where the execution was returned before the return day.[1]

But where the bill asks to have certain conveyances set aside as fraudulent, it may be sustained for that purpose.[2]

The assignor of a judgment is not a necessary party to a bill filed by his assignee on the judgment, unless there is a controversy between them, which makes it necessary for the protection of the defendant; although there is no objection to making him a party.[3]

All voluntary postnuptial settlements are not necessarily bad. They are good when made without fraud, by a party not indebted at the time, or whose debts are trifling compared with his property.[4]

Conveyances of real estate made after marriage for the purpose of vesting the title in the wife, the husband being at the time insolvent, were held fraudulent and void, not only against existing, but subsequent creditors.[5]

[*496] *Judgment creditor's bill, to have a judgment paid out of equitable assets belonging to the debtor, and to set aside certain conveyances as fraudulent against creditors.

The bill sets forth that the complainant, Elisha Beach, November 11th, 1840, obtained a judgment against Jonathan R. White, in the Circuit Court for Oakland county, for $473.79 damages, and $40.65 costs. That, after verdict, which was

[1] See Smith *v.* Thompson, *ante*, 1, and note.

[2] A bill cannot, however, be maintained to set aside a fraudulent conveyance until a levy has been made. McKibben *v.* Barton, 1 Mich., 213. See, also, Griswold *v.* Fuller, 33 id., 268; Tyler *v.* Peatt, 30 id., 63.

A levy of an attachment on an equitable interest in land not subject to attachment, where the defendant is not served with process and does not appear, and the recovery of judgment and issue of execution thereon, do not create such lien as equity will enforce. Trask *v.* Green, 9 Mich., 358. See, also, Maynard *v.* Hoskins, id., 485.

[3] See Morey *v.* Forsyth, *ante*, 465.

[4] See Cutler *v.* Griswold, *ante*, 437, and note.

[5] See Herschfeldt *v.* George, 6 Mich., 456; Doak *v.* Runyan, 33 id., 75; Smith *v.* Brown, 34 id., 455.

rendered March 28th, 1840, and before judgment, Beach assigned the damages to the complainant, Williams, as survivor of Crocker & Williams. That, on the 28th day of November, 1840, an execution was issued to the sheriff of Lapeer county, returnable on the second Tuesday of March thereafter, which was returned unsatisfied December 16th, 1840. That the judgment was unpaid, and defendant has equitable interests, &c.

The bill further sets forth that Jonathan, on or about April 22d, 1840, for the pretended consideration of $5,000, conveyed to Phineas White certain lands therein described, which conveyance the bill charges to have been fraudulent. That, since the verdict was given, and previous to the making of said deed, said Jonathan had said he never would pay the debt, and Beach should never collect it; and, since the deed, that he had so arranged his affairs as to prevent the collection of it. That Jonathan is in possession of, and equitably owns four village lots in Lapeer, which he pretends belongs to his wife, which the bill charged were once owned by him in his own name, with other property, and if the title was in her, that it had been conveyed by Jonathan to some unknown person, who had deeded it to her, that Joanthan might enjoy it, undistured by his creditors.

The joint and several answer of defendants submits whether complainants can rightly join in, or bring the present action, on their own showing. Denies that Jonathan *has [*497] any property, real or personal, or things in action, except such as is exempt by law, and a few articles of trifling value, which would have been given up on the execution if required; states that Louisa D. White inherited and received in her own right $1,324.05, for her own use, and of which she had control independent of her husband, which she authorized him to invest in land as he should think best for her interest. That, in the winter of 1831-2, he came to Michigan, and purchased one-fourth of the "Lapeer Mill property," so called, of Terry, Chamberlin, and Whittemore, of Pontiac, for which he paid $420 of Louisa's money. Also, he bought of the U. S. 160 acres of land, for which he paid $200, on which he made some improvements to the amount of about $175 or $180;

making an expenditure of Louisa's money, up to September 26th, 1842, of nearly $800. That, on the purchase of said mill property, Terry executed a bond for a deed, to be given on certain conditions which Jonathan afterwards performed. That, in September, 1832, Phineas advanced money to Jonathan, with which he purchased the remaining three-fourths of the mill property for Phineas, and the whole of it was then conveyed to said Jonathan. That, on the 24th of October, 1832, Jonathan and Louisa conveyed all their legal interest in the lands to Phineas, who subsequently, on the 17th of November, 1832, conveyed to Louisa the 160 acre tract, and an undivided fourth part of the other lands; and that this course was adopted by advice of counsel, to vest in Louisa and Phineas their respective interests. That, when Jonathan made the conveyance to Phineas of other lands therein described, in April, 1840, he was indebted to him in a sum larger than the value of the property conveyed, and that it was made in pursuance of a prior agreement. Denies that Jonathan owns any property in Lapeer, and states that the village *lots mentioned in the bill are a part of his wife's property. States that he failed in 1828, and was indebted by reason thereof when the lands were conveyed to Phineas and Louisa in 1832, but denies that such conveyances were made to defraud creditors.

[*498]

It further appeared that the money was kept in Louisa's possession, who gave parts of it to her husband to invest, at different times, and used a part herself; and that there was never any written agreement to invest it, either before or after marriage.

M. L. Drake, for complainants.

The principal question in this case is, whether *a voluntary conveyance, by a man who is at the time insolvent, can be impeached by subsequent creditors.*

We take it for granted that White, by receiving into his

hands his wife's money, and purchasing with it land in his own name, made the property his own. Reeve's Dom. R. 1, 60.

White being at that time largely indebted, and having no property but this, his creditors had the undoubted right to have the lands applied in payment of their demands while the title was in him. Having this right, they could not be deprived of it by a voluntary conveyance.

Voluntary settlements are good against subsequent creditors, only when the settler is *not indebted at the time*. And positive fraud will vitiate any such settlement. Hov. on Fraud. 75; Reeve Dom. Rel. 176, 180; 8 Wheat. R. 229; Fonbl. Eq. 205; *Gilmore* v. *North America Land Co.* 1 Pet. C. C. R. 460; *Thompson* v. *Dougherty*, 12 Serg. & R. R. 448; 3 Dessaus. 1; 3 J. C. R. 500; 11 Mass. R. 421.

Hunt & *Watson*, contra.

*The Chancellor. The bill cannot be sustained as to [*499] the equitable assets, or *choses in action*, belonging to J. R. White, the judgment debtor;—the execution having been returned before the return day. *Smith* v. *Thompson*, *ante* 1 But it may be sustained as to the conveyances charged to be fraudulent against his creditors. For this purpose, it is only necessary to show an execution has been issued. *Williams* v. *Hubbard*, *ante* 28.

Beach, the assignor of the judgment, is not a necessary party Had he not united with his assignee in filing the bill, or otherwise been made a party, the bill, on that account, would not have been demurrable. *Morey* v. *Forsyth*, *ante* 465. The assignor of a judgment was formerly considered a necessary party to a bill filed by his assignee; *Cathcart* v. *Lewis*, 1 Ves. R. 463; and will still be so considered by the Court, where there is a controversy between the assignor and assignee relative to the assignment, making it necessary for him to be a party for the protection of defendant. Id. While, therefore, the assignor is not, in all cases, a necessary party, no objection can be taken to his being made a party.

The conveyance of the 160 acre lot, and a quarter of the mill property, on October 24th, 1832, by J. R. White and his wife, to P. White, and the reconveyance thereof to the wife of J. R. White, on the seventh of November following, were intended to answer all the purposes of a settlement of the property on the wife. As a settlement, it was fraudulent and void against creditors; because it was after marriage, not in pursuance of any antenuptial contract, without consideration, and at a time when J. R. White was indebted to a much larger amount than he was able to pay. The money with which the land was purchased belonged to Louisa D. previous to her marriage; but, on the happening of that event, it became the property [*500] *of her husband by virtue of his marital rights, no settlement, or agreement for a settlement of it, on her, having been made before the marriage. She says there was no agreement in writing, or contract between her and her husband, relative to the control or use of the money, previous to the marriage, or subsequent. All postnuptial voluntary settlements are not necessarily void as to creditors. They are good, when made without any fraudulent intent, and by a person not indebted at the time, or, if indebted, whose debts are so small in amount, when taken in connection with the means still retained by him to pay them, as to repel all presumption of fraud on their account.

The debt to Beach accrued long after the conveyances; but they are, nevertheless, fraudulent and void as to him and his assignee. Where a settlement is fraudulent against existing creditors, it is also as to subsequent creditors. *Richardson* v. *Smallwood*, Jac. R. 552. The justice of this rule is clearly exemplified in the present case. After Beach had obtained a verdict, but before judgment, J. R. White conveyed all his property to P. White, in payment of a debt of $5,000. This conveyance, being made in payment of a *bona fide* debt, and no suspicious circumstances attaching to it, is good against the grantor's creditors. But more than one-half of this debt was for money paid by P. White, for his brother, to different individuals to whom J. R. White was indebted prior to the year

1832. So that, had this part of the debt to P. White been paid out of the property conveyed to Louisa D., something would have been left to pay the Beach judgment.

A decree must be entered declaring the deed of October 24th, 1832, from J. R. White and wife to P. White,—so far as it relates to the 160 acre lot, and the undivided quarter of the mill property,—and the deed of the seventh November *following, from P. White to Louisa D., fraudulent and [*501] void against the judgment mentioned in the pleadings, and against the complainants, and all other persons who may hereafter claim title to the premises through or under the judgment; and complainants are to be at liberty to sue out a new execution at law, and to sell so much of the property as is necessary to pay the judgment, and to recover their taxable costs in the suit against J. R. White. The bill to be dismissed, without costs, as to the defendant P. White.

Nathaniel Weed, Harvey Weed and Henry W. Barnes *v.* Joshua Terry.[1]

Where two parties claim the same land under conflicting titles, and there is a doubt as to which title is valid, that fact is sufficient consideration for an agreement to compromise and divide the land;[2] and a specific performance of such agreement, though not in writing, will be decreed, where the party seeking it has acted fairly, and there has been a part performance to take it out of the statute of frauds.[3]

The delivery of possession under an agreement, is an act of part performance.[4]

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[1] Affirmed, except as to that part of the decree requiring the husband to procure a release of the wife's right of dower, in 2 Doug., 344.

[2] As to the compromise of a disputed claim, being a sufficient consideration for a promise, see, also, Van Dyke *v.* Davis, 2 Mich., 144; Gates *v.* Shutts, 7 id., 127; Hale *v.* Holmes, 8 id., 37; Moore *v.* Detroit Locomotive Works, 14 id., 266; Converse *v.* Blumrich, 14 id., 109; Cassell *v.* Ross, 33 Ill., 245; McKinley *v.* Watkins, 13 id., 140; Burnside *v.* Potts, 23 id., 415; Farmers',

Bill for specific performance.

The bill states that, December 10th, 1839, complainants obtained a judgment, in the Circuit Court for the county of Oakland, against Robert Le Roy and Samuel C. Munson, on a bill of exchange drawn by them, in favor of complainants, no Daniel Le Roy, for $1,499.04 damages, and $23.42 costs. That execution was issued and delivered to the sheriff of Oakland county, who, February 4th, 1840, by Linus Jacox, his deputy, levied on Pontiac village lots 11, 12, [*502] 13, 34, 35 and 36, of the *subdivision of out-lots 14, 15, 16, 25 and 26, according to the plat of the same in the register's office for the county of Oakland, in book M. of deeds, 199. That the sheriff, by his deputy, gave due notice of the sale, and, on March, 28th, 1840, sold the lots to complainants for $1,591.01, the full amount due on said execution; and made the proper certificate. That a mistake occurred in the entry of said levy, and also in the notice of sale, in describing the premises as Pontiac village lots 11, 12, 13, 34, 35 and 36, according to the plat of said village, as recorded in

&c., Ins. Co. *v.* Chesnut, 50 id., 111; Knotts *v.* Preble, id., 226; Miller *v.* Hawker, 66 id., 185; Nichols *v.* Bradsley, 78 id., 44.

For cases where the consideration was held insufficient, see Tate *v.* Whitney, Harr. Ch., 145; Holland *v.* Hoyt, 14 Mich., 238.

While the settlement of conflicting claims will not be opened to inquire into the equities, yet such protection is not afforded to a transaction where what the party gives is given under protest that it is not payable, and with an understanding that he reserves his defense to it; a settlement in the nature of a compromise must be made as such, and so understood on both sides. Jennison *v.* Stone, 33 Mich., 99.

[3] See Hunt *v.* Thorne, 2 Mich., 213.

[4] But possession of the premises will not avail the complainant when it is sufficiently explained by the relationship of father and son existing between the parties. Jones *v.* Tyler, 6 Mich., 364.

A verbal agreement to advance money to purchase lands and to remove encumbrances on them, and ultimately to transfer them to another on repayment, where the latter was all the time in possession and did no act to his own prejudice which would amount to part performance, will not be specifically enforced in equity. Moote *v.* Scriven, 33 Mich., 500.

As to part payment's not amounting to a part performance so as to take the case out of the statute, see Colgrove v. Solomon, 34 Mich., 494.

the register's office, in book "M.," page 119; but the levy and sale were made of the lots first described, and there is no plat of any part of said village recorded in said book M., except at page 199, the place first mentioned. That, on March 30th, 1842, the redemption having expired, the sheriff executed a deed of the lands to complainants; and that all the lots were occupied as one parcel. That Robert Le Roy and wife executed a deed of the same premises to the defendant Terry, in March, 1840, after the levy, and before the sale to complainants; and said Le Roy and Terry are charged with notice of the levy at the time said deed was executed; and that the makers and acceptors of said bill were and are bankrupts, and wholly insolvent. That Terry, in the summer of 1840, made proposals to complainants, through H. C. Knight, their attorney, for an amicable arrangement of their claims to said premises, by an appraisal and division in proportion to their respective demands on Le Roy,—he stating his claim at about $1,100,—which proposition was afterwards agreed to by complainants, and such acquiescence made known to Terry, who still adhered to the proposition. That, after long delay, about March 1st, 1842, Terry agreed with Knight upon Willard McConnell to appraise and divide said property, in pursuance of said agreement, *and that lots 11 and 12 fell to the share of complain- [*503] ants, and 13, 34, 35 and 36 to Terry; and that both parties went into possession of their respective parcels, and ever since complainants have continued in possession of lots 11 and 12, and exercised all acts of ownership over them. That, about April 1st, 1842, in pursuance of the agreement by which each party was to quit-claim to the other their respective lots, a quit-claim deed of lots 13, 34, 35 and 36, from complainants to Terry, was drawn up by said Knight, and sent to New York, from whence it was returned duly executed, to be delivered by said Knight to Terry, on receiving from the latter a quit-claim deed of lots 11 and 12, and was tendered to Terry on or about the first of June, 1842, when he refused to complete such agreement. That, soon after that deed was forwarded to New York, a quit-claim deed for the other lots was drawn up

by Knight, at Terry's request, which he promised to execute, with his wife, when Mr. Whittemore, with whom he desired it should be left, would call at his house for that purpose; and afterwards, in Whittemore's presence, refused, saying he had been advised not to execute it. Prays for specific performance, injunction, &c.

The answer denies that the levy was made on the lots in controversy, and avers that, it appears by the return, it was made upon lands described otherwise, and that the sheriff gave notice of the sale of the premises, only, described in his return. Admits the sale of the lots described in the bill, and that complainants were the purchasers; and the giving of the certificate. Denies that said lots were in one parcel, but asserts that a road ran between the two parcels, as proposed to be divided. Admits the deed from Le Roy, and states the consideration at $1,400, but denies notice of the levy at that time. Denies that he made the proposition to divide the land to [*504] Knight, and *avers it came from Knight to him, and that he was induced to accede to it, by the fraudulent representations of Knight that the proceedings under the execution were regular and valid. Says that, after the time of redemption had expired, Knight again saw him and informed him the title had become absolute, but that he was still willing to have the land divided, whereupon they agreed upon McConnell, and the appraisal took place. Says that the agreement was not reduced to writing, and insists on the statute of frauds. Denies he put, or agreed to put, complainants in possession, but says Knight took possession without defendant's consent, and while he was absent from the State; and that, when he returned, he threatened to commence legal proceedings, but was induced by Knight to desist, he promising to institute proceedings in chancery to settle the title, and to account for the rents and profits. Admits Knight prepared a quit-claim deed for him to execute, and that he agreed to execute the same, but avers that he was deceived by fraudulent representations, and insists on the statute of frauds. Admits offer of quit-claim deed from complainants.

A replication was filed, and proofs were taken; but it is unnecessary to set forth the evidence, as the facts sufficiently appear in the opinion of the Court.

O. D. Richardson & H. C. Knight, for complainants.

G. W. Wisner & Wm. Draper, for defendant.

The Chancellor. It is not necessary to decide whether complainants, or defendant, would have succeeded at law in making a good title to the lots. Neither party was exactly satisfied as to the title. Both claimed the lots;—complainants under the levy and sheriff's deed to them, and defendant under his deed from Le Roy;—and *they finally [*505] agreed to compromise the matter by dividing them between them, in proportion to their respective claims against Le Roy, and McConnell was agreed upon to make the division. The doubt hanging over the title was a sufficient consideration for this agreement. *Attwood* v. ———, 1 Russ. R. 353. And, if there was nothing unfair on the part of complainants in bringing it about,—no advantage taken of defendant,—and there has been a part performance of it to take it out of the statute of frauds, a specific performance should be decreed.

The delivery of possession under an agreement is an act of part performance. *Willis* v. *Stradling*, 3 Ves. R. 378; *Boardman* v. *Mostyn*, 6 Ves. R. 467; *Bowers* v. *Cator*, 4 Ves. R. 91; *Gregory* v. *Mighell*, 18 Ves. R. 328; 1 Sugd. on Vend. 116, and cases there cited.

The agreement, and the division of the lots by McConnell, who awarded numbers 11 and 12 to complainants and the others to defendant, are admitted; but defendant denies delivering possession of them to complainants, or to Knight, their agent. The only effect of this denial is to drive complainants to proof of the fact;—the answer not being evidence, though under oath, as an answer under oath is waived by the bill. Knight, who is complainants' principal witness, and who acted as their agent in making the agreement, and was one of their attorneys in obtaining the judgment against Le Roy, states in

his testimony that Terry said, after the division was made by McConnell, that it was fair, and he was satisfied with it; and that it was then agreed, deed should be executed by the parties to each other, and that, in the meantime, they should take possession of their respective portions. That Hunt, as tenant to Terry, was then in possession of all the lots; and, as the year for which they had been let to him would expire in a [*506] few days, Terry was to receive the rent; that *Knight, as agent, agreed to let lots 11 and 12 to Hunt for another year, at $100 rent, if Hunt did not remove upon a farm he owned; and that Hunt, under this agreement, occupied the premises about a fortnight after his lease from Terry expired, when he went to reside on his farm, and the premises were let by Knight to a Mr. Miles. Knight's testimony does not stand alone with regard to the possession. It is supported by facts and circumstances, testified to by McConnell and Hunt. McConnell says, Terry expressed a willingness at the time, (when the lots were divided,) to give possession of the house and two lots. Again, "I think it was agreed that each party should, at the time, go into possession." Hunt says, "Terry did not appear to have anything further to do with the house; and Mr. Knight took upon himself the control, without any objection, to the knowledge of deponent, from Mr. Terry." If Terry had not given up the possession to complainants, how happened it he did not call upon Hunt, to know whether he wanted the premises another year; or for rent the fortnight he continued in possession after his year had expired? Or that he did not rent the premises to some other tenants? Was he ignorant that Knight, as complainants' agent, was acting the landlord in letting the house, making repairs, and the like? He says Knight took possession when he was absent, and without the State. But he does not state the time, nor has he adduced any proof of the fact.

Terry was not taken by surprise when he entered into the agreement. The first conversation between him and Knight on the subject, was in the summer of 1840, and the division was not made until March, 1842. After the deed to complain-

ants for the two lots had been drawn, and Knight and Whittemore had called with it at his house, to have it executed by him and his wife, and found *him absent from home; [*507] on being informed of it, he promised to execute the deed whenever Whittemore would call again for the purpose. That he was deceived all this time in supposing the proceedings on the execution were regular, and that there was no question as to complainants' title, is incredible, and contradicted by the testimony in the case. Could he have thought Knight wished to give him his clients' property? In a conversation between him and Knight, Charles Terry, his own witness, says he heard him say the sheriff's sale was not good; Whittemore testifies to about the same thing, in one or more conversations he heard between them, and, moreover, that Terry advised with him as to what he had better do.

A decree must be entered that defendant execute, acknowledge, and deliver to complainants, a quit-claim deed of lots 11 and 12, with a covenant against his own acts, and procure his wife to join therein or release her right of dower, on receiving a like deed, executed and acknowledged by complainants, for the other lots. And defendant must pay to complainants their costs.

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*Linus Jacox *v.* Nelson W. Clark.[1] [*508]

Where defendant received a grant of the right to use certain water power, and dig a race on complainant's land, in consideration of erecting a mill at a certain place where their lands joined, and then built his mill at another place, and diverted the water from complainant's land, *it was held*, that the consideration had failed, and the complainant was entitled to a reconveyance; and defendant was enjoined from setting up his deed in defense of any action for a previous diversion of the water.

[1] S. C., *ante*, 249.

Jacox *v.* Clark.

This was a bill to restrain defendant from diverting water from complainant's land; and for specific performance of an agreement, or a reconveyance of certain privileges.

The complainant, in 1835, holding a certain tract of land as tenant by the courtesy, which was in two places crossed by a creek, on which, at that place, there was a descent and water sufficient for propelling machinery, purchased an adjacent tract, by which he became possessed of all of the stream between the points of intersection with his boundary lines. The stream, before entering his land, passed through a lake, containing about forty acres, and thence through a lot subsequently purchased by defendant, immediately to the north of complainant. On February 10th, 1843, defendant, alleging that he owned the lands on the stream above complainant's lot, proposed to complainant, if he would grant him the premises hereinafter described, to improve the water privilege such grant would give him, connected with his own premises, by erecting thereon a building with machinery for an oil mill, or for manufacturing wool, or both; complainant's permission being necessary to enable him to do so. Complainant, in consideration thereof, and for the nominal consideration of one dollar, thereupon duly conveyed to him the following right, viz. "The right of cutting or digging a ditch, commencing at any point the said Clark shall elect [*509] *on the north line of the farm now owned and occupied by said Jacox, situated on sections twenty and twenty-nine, in said town, county, and State, and running to the creek, [the stream before mentioned,] and the right of settling the bed of the creek, [on the lands of Jacox,] down as low as the said Clark may choose, for the purpose of drawing the water from a water wheel, which the said Clark intends to erect, for the purpose of manufacturing linseed oil, and also for the purpose of manufacturing wool into rolls or cloth; provided, that said Clark keeps the said ditch open and clear, so that the water may have a free passing off; and provided that said Clark shall not dig more than one ditch."

After obtaining this deed, Clark gave up the intention of erecting his mill where he had agreed with Jacox to build it,

and proceeded to dig a race leading directly from the lake through which the before mentioned stream flowed, to a principal branch of Clinton river, into which branch the stream emptied. He also went on to build a dam where the stream left the lake, in such a manner that the water was diverted from it, and passed through the race into the main branch; in this way cutting off the water power from Jacox's land.

Complainant sought an injunction against the diversion of the water, and prayed defendant might be compelled to build his mill according to agreement, or else be decreed to reconvey to complainant the privilege granted by the deed of February 10th, 1843.

M. L. Drake and T. J. Drake, for complainant.

G. W. Wisner, for defendant.

The Chancellor. The consideration of the right to use the water, and to dig a race on complainant's land,*was [*510] the erection of the mill on that part of defendant's land lying immediately north of complainant's. But defendant has built the mill on other lands belonging to him; and takes the water directly from the lake, instead of the creek forming the outlet of the lake, and, after using it, carries it by a race into a branch of the Clinton river, instead of returning it into the bed of the creek on complainant's land. No such right as this is given by the deed. On the contrary, it is inconsistent with, and hostile to the right granted. The two cannot exist and be in operation at the same time, without impairing each other. Complainant had a right to have the water of the lake flow across his land in its natural course; and, as incident to it, to allow a diversion of the water on such terms and conditions as he thought proper. It is not for this Court, or the defendant, to impose the terms, or to say the present location of the mill is as advantageous to him and his property, as the one indicated in the grant, and had in view by the parties when the deed was executed. I am therefore of the opinion, as the consideration

of the grant has wholly failed, complainant is entitled to a reconveyance of all rights granted by the deed of February 10th, 1843, and to his costs. *Quick* v. *Stuyvesant*, 2 Paige R. 84. Defendant must also be enjoined from setting up the deed of February 10th as a defense, at law, to any action that may be brought against him for having heretofore diverted the water.

NOTE. The injunction granted on filing the bill had been dissolved, on the coming in of the answer. *See same case, ante*, 249.

[*511] *TOUSSAINT CHENE *et al. v.* THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF MICHIGAN.

Under the act of Congress of March 3d, 1807, entitled, "An act regulating the grants of land in the Territory of Michigan," which provides, that the fee simple of every tract or parcel of land that was settled, occupied and improved, prior to the first day of July, 1796, should be granted to the person or persons in the actual possession, occupancy, and improvement thereof;—*it was held*, that the act recognized no right in claimants but that of occupancy or possession, as the stock in which the fee was to be ingrafted; and that where three brothers, on the death of their father, claimed a tract of land under a "substitution," or a kind of entailment, by which the land belonged to the eldest son his lifetime, and after his death to the second son his lifetime, &c., the eldest son, under the claim set up by the brothers, being entitled to the occupancy or possession in his own right, to the exclusion of his brothers, was also entitled to the fee simple in his own right, under the act of Congress; and that, having presented his claim, and procured its allowance, and obtained a patent for the land, there was not a resulting trust in favor of his brothers.

ABOUT the year 1802, one Charles Chene, a resident of Detroit, died in possession of a farm constituting the front of what is now known as the De Garmo Jones farm, west of the city. He left three sons,—Pierre, the eldest, Toussaint, the

second, and Gabriel,—and one daughter. Pierre continued in possession of the farm after his father's death, and, some three or four years after, purchased a farm above the city, now known as the "Chene farm," of one Joseph Serre, surnamed St. Jean, and took a conveyance of it in his own name. About the same time, the three sons conveyed all their interest in the De Garmo Jones farm to one Antoine La Selle. Toussaint went into possession of the St. Jean farm, and cultivated the same for two years, dividing the produce with Pierre; when, in consequence of some misunderstanding between them, a fence was run through the farm, dividing it into two parts; and Toussaint continued to occupy and cultivate the *northeast [*512] half, and Pierre took possession of, and cultivated the other half. The fee of both the De Garmo Jones farm and the St. Jean farm was in the government.

By an act of Congress, entitled "An act regulating the grants of land in the Territory of Michigan," approved March 3d, 1807, it was provided that the fee simple of any tract or parcel of land, that was settled, occupied and improved, prior to the first day of July, 1796, should be granted to the person or persons in the actual possession, occupancy and improvement thereof; and commissioners were appointed for the purpose of ascertaining and deciding on the rights of persons claiming the benefit of the act. Pierre presented a claim for the whole of the St. Jean farm, to the commissioners, for confirmation, by whom his claim was allowed; and he obtained a patent for the land in 1811. In August, 1818, Pierre sold the half of the farm in possession of Toussaint to one Godfroy, who subsequently sold it to the defendants. Toussaint died in possession of the premises in 1834, and, soon after his death, an action of ejectment was brought by defendants, in which they recovered a verdict; when complainants filed their bill to restrain further proceedings at law, and claiming a resulting trust in their favor, under the deed from St. Jean to Pierre Chene.

It is unnecessary to make a more full statement of the case,

as the remaining facts are sufficiently set forth in the opinion of the Court.

A. W. Buel, for complainants, contended that the St. Jean farm was purchased out of the proceeds of the Jones farm; and, the deed having been taken in Pierre's name, there was a resulting trust in favor of Toussaint and Gabriel. That Pierre wrongfully obtained the patent in his own name.

[*513] **G. E. Hand*, for defendants, insisted there was no resulting trust growing out of the sale of the Jones farm, and purchase of the St. Jean farm; that the grant from government was a mere gratuity; and that the action of the commissioners was conclusive in the matter.

The Chancellor. The act of Congress, under which the St. Jean farm was confirmed to Pierre Chene, makes the right of occupancy, or possession, the basis of confirmation. It provides that, to every person or persons in the actual possession, occupancy, and improvement of any tract or parcel of land, in his, her, or their own right, at the time of passing the act, and which tract or parcel of land was settled, occupied, and improved, by him, her, or them, prior to and on the first day of July, 1796, or by some other person or persons, under whom he, she, or they, hold or claim the right to the occupancy or possession thereof, and which occupancy or possession has been continued to the time of passing the act, the tract or parcel of land, thus possessed, occupied, and improved, shall be granted, and such occupant or occupants shall be confirmed in the title to the same, as an estate of inheritance in fee simple. Act of March 3d, 1807, Sec. 2.

Possession or occupancy was a good title against all the world, except the government, which held the fee simple. Government recognized this right of possession, and made it the consideration of granting the fee. And, if Pierre Chene, when he obtained a confirmation to himself of the St. Jean farm, held the occupancy or possession of the whole, or any part of it, under the deed from St. Jean, in trust for his broth

ers Toussaint and Gabriel, he, in equity, continued to hold the title in trust for them after the confirmation. For no principle is better settled, than that a trustee shall not be allowed to make any advantage to *himself from an [*514] abuse of his trust. The law will not even allow him to renew a lease for his own benefit, where the lessor has refused to renew it for the benefit of the *cestui que trust*. *Keech* v. *Sandford*, 3 Eq. Ca. Ab. 741.

There is nothing in the act of Congress, under which the title was confirmed to Pierre Chene, to prevent the operation of this equitable principle. Great injustice might be done if courts of equity were precluded from the exercise of their ordinary jurisdiction in such a case; and the act of Congress itself be made the means of vesting a title in a person for whom it was not intended.

It is not rejudging what the commissioners have done, as in the case of adverse claimants. If Pierre held the right of possession under the deed from St. Jean, in trust for Toussaint and Gabriel, his possessory title was their title; and a confirmation of such title, by the commissioners, a confirmation of their title. The two were consistent; and not inconsistent, as is the case with adverse titles, which, being inconsistent, destroy each other.

Nor is there anything in the nature of the conveyance from the government, it being a patent, to shut out the inquiry. Equity does not question the legal title in such cases, but lays hold of it for the *cestui que trust*, to prevent injustice. It is a well settled principle of law, that, where a deed is taken in the name of A., and the consideration is paid by B., a trust results in favor of the latter. Suppose the grantor to be the government, will that alter the case? Certainly not; for it is immaterial who the grantor is, whether he be an individual or the government, and whether the conveyance be a patent or the deed in common use.

This brings us to the question whether there was a resulting trust in favor of Toussaint and Gabriel, as to the posses-

[*515] sion under the deed from St. Jean to Pierre Chene. *On this complainants rest their claim to the premises in question.

The bill states that Charles Chene, the father of the three brothers, died about the year 1806, in possession of, and having *a certain equitable title* to the front part of what is now called the De Garmo Jones farm, and that, *upon his decease*, *such title passed and belonged to his male children*, the said Pierre, Toussaint, and Gabriel. By *a certain equitable title*, is meant the possession or occupancy of the land. But how, or in what way, this title, on the death of Charles Chene, *passed and belonged to his male children*, the bill does not state, but leaves us in the dark. It is certain, however, the brothers, after their father's death, did not claim the Jones farm by descent; for they had a sister then living, and, by the ordinance of 1787 she would have been entitled to an equal share with them, as tenants in common; yet, there is no mention made of her interest, and she did not join in the deed to La Selle. Moreover, this deed, signed by the brothers and La Selle, shows the Jones farm came to the Chene family from one Tetard, alias Forville; and that the brothers claimed it under a *substitution*, as it is called in the deed, or kind of entailment. The part of the deed to which we refer more particularly, is in these words:

"And the said Pierre Chene, Toussaint Chene, and Gabriel Chene, warrant unto the said Antoine La Selle, his heirs and assigns hereafter, the said premises as aforesaid, against all gifts, dowers, debts, mortgages, evictions, alienations, *substitutions*, and of all hindrances, of all incumbrances whatsoever. And, as a security for the said warranty, they mortgage unto the said Antoine La Selle, his heirs and assigns hereafter, all their present and forthcoming property, and more particulaaly the farm or plantation which Pierre Chene recently [*516] purchased from Joseph *Serre, surnamed St. Jean, lying and situate at the Grand Marais, in the district of Detroit, containing five arpents in front, by forty in depth, together with the buildings thereon erected. Also the orchard,

fences, and dependencies thereunto attached. This additional guarantee is to secure the said Antoine La Selle, his heirs and assigns hereafter, against all claims of the aforesaid Chenes, and of their heirs hereafter, by virtue of a *substitution said to have been made by Tétard, alias Forrille, of the said land as above sold, to the eldest of the male children of the family of the said Mess. Chene :* and also against an annual unredeemable rent of two pounds, New York currency, for which the said lands stands charged. *The said Pierre Chene and his said brothers, declaring by these presents that they intend transferring said substitution, and the said rent chargeable on said land that the said Pierre Chene has lately purchased of the said Joseph Serre, surnamed St. Jean, situate at Grand Marais as above mentioned.*"

Here then we have the *substitution*, under which the brothers claimed the Jones farm, transferred by them to the St. Jean farm, purchased in the name of Pierre. We say purchased in the name of Pierre, as we are satisfied from the evidence the St. Jean farm was purchased with the proceeds of the sale of the Jones farm to La Selle.

Toussaint never set up any other claim to the St. Jean farm than that growing out of the substitution. Abraham Fournier, a brother-in-law to Toussaint, with whom he was in the habit of almost daily intercourse, and one of complainants' witnesses, says, both before and after the sale to Godfroy he had frequent conversations with Toussaint, and asked him why he did not make some arrangement with Pierre, if he was entitled to part of the farm; otherwise Pierre would sell it and eat him up : to which Toissaint replied, "*he could not sell it*, because the farm *belonged to the Chene family, and that it was [*517] given to the Chene family from father to son; and that it belonged to *Pierre during his life*, and after that to Toussaint, and then to Gabriel."

In the deed to La Selle, and Fournier's testimony, we have evidence of two facts; that the brothers claimed the St. Jean farm under the substitution; and that, by the substitution, Pierre

Chene had a life estate, while the other brothers had an estate in expectancy only.

That Toussaint claimed an estate in expectancy, and not in possession, (except so far as he was allowed by Pierre to live on a part of the farm, and cultivate it for the benefit of himself and family,) is proved by other facts. When Charles Chene died, Pierre, the eldest of the brothers, was left in sole possession of the Jones farm. There is no evidence his brothers occupied or claimed a joint occupancy, with him; or that he ever paid them rent. Toussaint was at this time living on Hog Island. How long after Charles Chene's death it was, before the farm was sold to La Selle, does not distinctly appear. Francis La Selle, whose testimony is entitled to as much weight, if not more, on that point, as that of any other witness, thinks it was four or five years. Toussaint and Gabriel, no doubt, joined in the deed to La Selle, to cut off their expectant estate in the Jones farm under the substitution; and not on account of any right they had to the possession in Pierre's lifetime. And the fact of Pierre's having a life estate in the Jones farm, is probably the reason why the deed of the St. Jean farm was taken in his name.

Toussaint, it is true, took possession of the St. Jean farm soon after it was purchased; but it was as tenant to Pierre, and not in his own right. He worked the farm, and divided the produce with Pierre, each taking half, for the first two [*518] years, when there was a difficulty between *them, and the farm was divided; Toussaint continuing in possession of one half, and Pierre taking possession of the other. In the division of the two years' produce, we hear nothing of Gabriel. Toussaint divided what he raised with Pierre only.

Joseph Campau swears Toussaint often told him the farm belonged to Pierre, his brother.

From the testimony, which is too voluminous to go more into the detail, we have come to the following conclusions:

First. That the three brothers, after their father's death, claimed the Jones farm under the substitution from Forville.

Second. That, by the substitution, Pierre, who was the eldest brother, was entitled to the farm during his lifetime.

Third. That the substitution was intended to be transferred from the Jones farm to the St. Jean farm; and,

Fourth. That Pierre Chene allowed Toussaint to occupy and cultivate one half of the St. Jean farm, as a matter of favor, and by way of assisting him and his family, and not as a matter of right.

Pierre, according to the claim of the three brothers, being in his own right entitled to the possession, first of the Jones farm, and afterwards of the St. Jean farm, during his lifetime, was in his own right entitled to the fee simple under the act of Congress, which recognized no right but that of possession or occupancy, as the stock in which the fee was to be ingrafted.

If we are wrong in this, and he could not rightfully take any greater estate than he previously claimed, and that was an estate tail, (for it does not appear what this substitution was, unless it was an estate tail,) the entailment was cut off by the act of March 2d, 1821, abolishing entails, and vesting allodial estates in the tenants in tail. Laws of 1833, p. 278.

*Other questions were raised and discussed which it [*519] is unnecessary to decide, after having given an opinion upon the above points.

Bill dismissed, with costs.

James Benhard *et al. v.* Francis Darrow *et al.*

When a person not a party to the suit, has come into possession of mortgaged premises since its commencement, and refuses to deliver up possession to the purchaser, on production of the Master's deed and a certified copy of the order confirming the sale, a writ of assistance will not be granted, unless notice of the motion, with the affidavit on which it is founded, is served upon him.[1]

[1] See Hart *v.* Linsday *ante*, 144; Baker *v.* Pierson 5 Mich., 456. See, generally, as to when it is proper, Ramsdell *v.* Maxwell, 32 Mich. 285.

Motion for a writ of assistance to put one of complainants in possession of mortgaged premises purchased by him at the Master's sale. It appeared from the affidavits on which the motion was founded, that one Parks, who was not a party to the suit, was in possession of a part of the premises; that he had but recently taken possession under one of defendants; and that he refused to deliver possession to the purchaser, on being shown the Master's deed, and a certified copy of the order confirming the sale.

L. Allen, in support of the motion.

The Chancellor. Parks, not being a party to the suit, should have been served with notice of the motion. Where a party to the suit is in possession, the motion is *ex parte;* but one in possession not a party to the suit, is entitled to notice of the motion, and to be heard on it, so far as the granting of it may affect his rights.

Let an order be entered requiring Parks to show cause against the motion, on being served with copies of the affidavits, &c.

[*520] *Gilkey *v.* Paige.

When a defendant, who might, by demurrer or plea to the whole bill, have protected himself against a particular discovery, submits to answer the whole bill, he must answer as fully as in any other case.

When irrelevancy is made a ground for refusing to answer a particular question, or part of a bill, it should appear that an answer to such part would, in no aspect of complainant's case, as made by the bill, be of service to him.

Exceptions to Master's report, disallowing exceptions to answer.

D. Stuart, for complainant.

E. C. Seaman, for defendant.

The Chancellor. The rule that, if a defendant submits to answer a bill, he is bound to answer it fully, when understood to mean he must answer every particular charge or allegation in the bill, notwithstanding there may be particular objections to answering such charge or allegation, not applicable to the whole bill,—has many exceptions; as where an answer to such charge or allegation would subject defendant to a penalty or forfeiture, or would criminate him, or would be immaterial to complainant's case, or would require him to disclose some fact which he is not bound by law to disclose. But when the rule is understood in its more restricted and correct sense, it means that when a defendant, who might, by demurrer or plea to the whole bill, have protected himself against a particular discovery, submits to answer the whole bill, he thereby waives a right, having its origin in the rules of pleading, and which is incident to a particular mode of defense; and must answer as fully as in any other case.

*Mr. Wigram says, "The proper explanation of the [*521] rule is—that, if a defendant who *might* have defended himself by demurrer, or plea—and thereby escaped from the necessity of answering all, or part of the bill—has waived those modes of defense, and *elected* to make his defense by answer—he cannot urge the demurrable character of the bill *only*—or that a plea might have been sucessfully pleaded to it *only*—as a reason for not answering *particular* questions. The submission to answer concludes him as to that—*but no further*. The rule decides only that an answer which is the result of *choice*, is subject to the same rules as an answer from necessity." Wigram on Discovery, 193.

The exceptions not allowed by the Master, it is insisted, are to matters wholly irrelevant; and which, if admitted would not entitle complainant to a decree in his favor. To determine the relevancy of the matters excepted to as not answered, we must

look to the case made by the bill. Defendant having advertised for sale, under the statute, certain premises mortgaged to him by complainant for $400, the latter filed his bill to obtain an injunction against the sale, and for other and further relief. The bill alleges usury in the loan of money for which the mortgage was given. It also alleges that the bills of the Farmers' Bank of Genesee County were received as money; that, soon after, the bank failed; that some of the bills which complainant had passed off, before he knew of the insolvency of the bank, were returned to him; that some he disposed of afterwards for a trifle, and that he still had a considerable amount of them on hand. It also alleges that the pretended bank was a fraudulent institution; and charges various facts and circumstances relative to its mode of doing business, in proof of the fraud, and connecting defendant with it. [*522] There is no special prayer for relief; but under the *general prayer, complainant may have such relief as the nature of the case made by the bill will warrant. The exceptions not allowed by the Master, relate to the fraudulency of the institution. Now, should complainant be able to prove the bank, from its inception throughout, was intended to defraud the community; that defendant was a party to the fraud; and the complainant still retains in his possession a part of the bills received by him of defendant, would it be contended no relief could be given, and that the amount of such bills should not be deducted from what is due on the mortgage? It is unnecessary to go further, on the present occasion, and say what would be the effect of such fraud on the mortgage itself, as between the parties to it.

When irrelevancy is made a ground for refusing to answer a particular question, or part of a bill, it should appear an answer, in no aspect of complainant's case as made by the bill, could be of service to him.

Exceptions to Master's report allowed.

*John Sutherland *v.* Flavius J. B. Crane. [*523]

Parol evidence cannot be received to add to, or vary the terms of a written instrument.[1] It may be introduced for the purpose of showing fraud, or a mistake in drawing the instrument, when the fraud or mistake is set forth in the bill, and the relief asked is based upon it; but not otherwise.[2]

Motion to dissolve injunction.

The bill in this case was filed to restrain proceedings at law on a promissory note, executed by Solomon Sutherland, Thomas M. Sutherland, and complainant. It alleged that defendant, having attached certain real estate of Solomon Sutherland for a debt, agreed at the time of executing the note, which was given in settlement of the attachment suit, that if Thomas and complainant would sign it with Solomon, the attachment suit should be discontinued; and defendant would receive State scrip, or State warrants, in payment of the note. That Solomon afterwards offered to pay the note in State warrants, which defendant refused to receive; and, in a day or two thereafter, sued complainant on the note. That the attachmant suit had

[1] See, generally, Martin *v.* Hamlin, 18 Mich., 354; Vandekarr *v.* Thompson, 19 id., 82; Jones *v.* Phelps, 5 id., 218; Adair *v.* Adair, 5 id., 204; Bowker *v.* Johnson, 17 id., 42; Abell *v.* Munson, 18 id., 306; Picard *v.* McCormick, 11 id., 68, bill of sale; Rowe *v.* Wright, 12 id., 289, receipted bill of parcels; Trevilick *v.* Mumford, 31 id., 467; Seaman *v.* O'Hara, 29 id., 66; Sirrine *v.* Briggs, 31 id., 443; Beers *v.* Beers, 22 id., 42; Blackwood *v.* Brown, 34 id., 4.

A deed of lands, though absolute in form, may in equity be shown to be a mortgage. Wadsworth *v.* Loranger, Harr, Ch., 113; Emerson *v.* Atwater, 7 Mich., 12.

So at law, as to a bill of sale of personalty. Fuller *v.* Parish, 3 Mich., 211.

A witness may be asked whether a deed and mortgage have been given, the question not calling for their contents. Clemens *v.* Conrad, 19 Mich., 170

[2] As to a patent from the United States not being impeachable at law for fraud or mistake, See Bruckner *v.* Lawrence, 1 Doug., 19.

As to disproving identity of patantee, see Stockton *v.* Williams, *ante*, 120, s. c., 1 Doug., 546; Campau *v.* Dewey, 9 Mich., 381.

not been discontinued, and complainant was ready and willing to pay the note in State warrants. An injunction having been granted, a motion was made to dissolve it.

N. R. Ramsdell, in support of the motion.

O. Hawkins, contra.

The Chancellor. Parol evidence cannot be received to add to, or vary the terms of a written instrument. It may be introduced for the purpose of showing fraud, or a mistake [*524] in drawing the instrument, when the fraud or *mistake is set forth in the bill, and the relief asked is based upon it; but not otherwise. *Wesley* v. *Thomas*, 6 Harr. & John. R. 24. The bill does not charge the note, on which complainant has been sued, is not what it was understood and intended to be when it was executed. There is no allegation it was to have been drawn payable in State scrip, or State warrants, and that these words were left out by mistake, or were omitted in consequence of any fraudulent representation of defendant.

As to attachment suit, the Court in which it is pending has ample power to protect the rights of the parties, and order a discontinuance on payment of the note.

Injunction dissolved, with $5 costs to defendant.

*Orson Quackenbush *v.* Bradford Campbell, [*525]
administrator *de bonis non*, of the estate
of William A. Clark, deceased, and James J.
Forsyth.

The Same *v.* Bradford Campbell, administrator,
&c., and Anthony Froemer.

The Same *v.* Bradford Campbell, administrator,
&c., and Joseph Alexander.

Where an estate had been represented insolvent by an administrator *de bonis non*, a motion was granted staying proceedings on execution, for balances due on certain mortgage foreclosures, (not being such debts as are preferred by law,) which had been levied before such representation of insolvency.

It is immaterial whether the estate be represented insolvent by the original administrator, or the administrator *de bonis non;* the provisions of the statutes applying to the former, apply also to the latter, where there is no express provision to the contrary.

No time is limited by statute, within which an estate must be declared insolvent by an executor or administrator.

Motion on the part of the administrator *de bonis non*, in each of the above cases, to stay proceedings on an execution issued for a balance reported to be due from the intestate's estate, after sale of mortgaged premises by Master under decree.

Kingsley & Miles, in support of the motion.

Lawrence & Fletcher, contra.

The Chancellor. Since the levy of the executions on the real estate belonging to the intestate during his lifetime, the estate has been represented insolvent in the Probate Court by the administrator *de bonis non*, who asks for an order staying all further proceedings on the execution, until the question of insolvency is determined in that Court.

The statute provides that "No action shall be brought [*526] *against an executor or administrator, after the estate is represented insolvent, unless it be for a demand that is entitled to preference, and could not be effected by the insolvency of the estate, or unless the assets should prove more than sufficient to pay all the debts allowed by the commissioners; and if the estate is represented insolvent, while an action is pending against the executor, or administrator, for any demand that is not entitled to such preference, the action may be discontinued without the payment of costs; or, if the demand is disputed, the action may be tried and determined, and judgment may be rendered thereon in like manner, and with the same effect, as is provided in a case of an appeal from the award of the commissioners; or any action may be continued at the discretion of the Court, without costs to either party, until it shall appear whether the estate is insolvent; and if it shall not prove to be insolvent, the plaintiff may prosecute the action as if no such representation had been made." R. S. 298, § 19.

No time is fixed by the statute, within which the estate must be represented insolvent. The tenth section (R. S. 288) provides, that no executor or administrator shall be held to answer to the suit of any creditor of the deceased, if commenced within one year after his giving bond for the discharge of his trust, except in certain cases, but does not require the estate to be represented insolvent in the Probate Court within the year. On the contrary, section twelve (R. S. 289) provides in express terms, that the estate may be represented insolvent after the expiration of the year, and after a part of the creditors have been paid. In *Walker* v. *Hill*, 17 Mass. R. 380, the estate was represented insolvent between three and four years after administration granted; and the administrator, in that case, recovered back a part of a claim paid by [*527] him in full *before the expiration of the year,—the estate afterwards proving insolvent, by reason of the presentation of claims of which the administrator had no notice at the time. A like recovery was had by the same administrator, in *Walker* v. *Bradley*, 3 Pick. R. 261.

It is immaterial whether the estate be represented insolvent by the original administrator, or an administrator *de bonis non*. In *Hemenway* v. *Gates*, 5 Pick. R. 321, it was held that, "where an administrator dies within four years from the grant of administration, and an administrator *de bonis non* is appointed, actions of creditors are not barred until after the expiration of four years from the last grant of administration." That the two administrators could not be connected together, for the purpose of making out the four years, within which creditors were required to bring their suits. The statute was subsequently amended, and the amendment is to be found in our own statute. Reasoning from analogy, it would seem the different provisions of the statute applicable to an original administrator, are equally applicable to an administrator *de bonis non*, where there is nothing to the contrary in the statute itself. If so, no suit under the tenth section of the act, except such as are therein provided for, could be brought against an administrator *de bonis non*, until the expiration of a year after his appointment; and, in the present case, the estate was represented as insolvent by the administrator *de bonis non*, within the year.

The several executions being for demands that will be affected by the insolvency of the estate, all further proceedings upon them must be stayed, until it is ascertained by the proceedings in the Probate Court, whether the estate is insolvent or not; and until the further order of this Court. *Hunt* v. *Whitney*, 4 Mass. R. 620; *Coleman* v. *Hall*, 12 Mass. R. 570; *Clark* v. *May*, 11 Mass. R. 233.

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*Needham Hemingway *v.* Foster D. Preston. [*528]

Where an injunction had been granted, enjoining defendant from interfering with, or encumbering certain lands and premises, and defendant, at and previous to the granting of the injunction, being in possession of, and claiming title to, a mill on the land, forcibly put out two agents of the complainant who came into the mill after the injunction had been served, and re-

fused to leave when requested, it was held to be no violation of the injunction, which was not intended to dispossess the defendant.[1]

Motion for an attachment for a violation of an injunction.

The injunction was granted on January 24th, 1845, and, on the same day, served on defendant, commanding him "absolutely to desist and refrain from making any conveyance of, or creating any incumbrance or lien whatever upon," certain premises described in the writ; and that he should "*absolutely refrain and desist from any interference whatever* with the said land, real estate and premises, or the appurtenances to the same in anywise belonging," until the further order of the Court. Preston, it appeared, was in possession of a mill on the premises described in the injunction, at the time the writ was granted, claiming title thereto, and had been for three weeks previous. On the 25th of January, the day after the allowance and service of the injunction, one Spencer, in the employ of complainant, and Henry S. Hemingway, a son of complainant, were in the mill, whither they had gone by complainant's direction; and the miller having charge of the mill for Preston, wishing to lock up and go to his dinner, requested them to leave, which they refused to do. Preston, being informed of what had taken place, went to the mill, and finding them there, requested them to leave, which they refused, when he put them out by force.

[*529] **Stevens*, in support of the motion.

R. Hosmer, contra.

The Chancellor. The injunction does not require Preston to do any act, but to refrain from doing certain acts. It is wholly negative in its character, and was intended, as is manifest from its language, to prevent him from disturbing or molesting the actual possession or occupancy of complainant; and nothing more. It was not designed to dispossess defendant, or to turn him out of possession, and put complainant in.

Motion denied, with $5 costs to defendant.

[1] See People *v.* Simonson, 10 Mich., 335; Ramsdell *v.* Maxwell, 32 id., 285.

Daniel Thurston *v.* Azariah Prentiss, David Phelps, John Price, Jonas Crissman, and Amos Dalby.[1]

The effect of usury under our statute is, not to avoid the contract, but to reduce the amount which the usurer is entitled to recover to the money actually loaned, with legal interest.[2]

Where a surety, whose property had been levied on, paid a judgment confessed by himself and principal for a usurious loan, with a knowledge of the usury, *it was held*, that he might recover the amount, so paid by him, of his principal.[3]

Where a mortgage of indemnity was foreclosed at law, before the mortgagee had been damnified, the mortgagor was held entitled to redeem.[4]

On March 15th, 1839, complainant applied to defendant Prentiss for a loan of $300, which Prentiss agreed to make, provided complainant would allow him $100 for the use of it till October then next; which terms complainant accepted, and it was agreed between them that the whole sum of $400 should be embraced in two notes *of $200 each. [*530]

[1] Affirmed, 1 Mich., 193.

[2] See Craig *v.* Butler, 9 Mich., 21.

On an usurious contract the plaintiff may always recover interest up to the highest legal rate not prohibited by the statute, if such are the express terms of the contract. Smith *v.* Stoddard, 10 Mich., 148.

As to the rule where a new security has been taken, see Smith *v.* Stoddard, *supra;* Craig *v.* Butler, *supra;* Collins Iron Co. *v.* Burkham, 10 Mich., 283.

The borrower has, under the statute, no remedy, but the deduction of the amount payable by the terms of the contract over and above the principal and legal interest. Craig *v.* Butler, *supra.*

And that deduction may be made where the suit is brought in equity, as well as in an action at law, notwithstanding the word "action" is used in the statute. Coatsworth *v.* Barr, 11 Mich., 199.

[3] But where the usurious interest paid by the surety, is paid for the purpose of obtaining time in which to pay his principal's debt, the excessive interest so paid by him can not be collected of his principal. Thurston *v.* Prentiss, 1 Mich., 193.

[4] See s. c., 1 Mich., 193; Dye *v.* Mann, 10 Mich., 291; Butler *v.* Ladue, 12 id., 173.

signed by the complainant and some other person, upon which judgments should be confessed before a justice of the peace, and execution stayed. Complainant and Phelps executed the notes and confessed judgments upon them, and the defendant, John Price, stayed execution until July 16th, in the same year. Price and Phelps required complainant to execute a note and mortgage for $650, payable on the first of August thereafter, which they caused to be immediately recorded; the consideration for which was their becoming sureties for complainant. After the expiration of the stay, an execution was taken out, and levied on Phelps' property, who executed a mortgage to Prentiss, payable July 1st, 1841, to secure the amount. The mortgage of idemnity was foreclosed under the statute, and bid off by Phelps for $438, on November 4th, 1839, at which time he had not, nor had Price, paid anything to Prentiss, or become damnified as complainant's sureties. Crissman afterwards purchased the interest of Phelps and Price in the land. August 27th, 1841, Phelps paid to Prentiss the amount secured by his mortgage, and took receipts in full of the judgments, and had the mortgage canceled; allowing ten per cent interest thereon.

H. T. Backus, for complainant.

R. P. Eldredge, for defendents.

The Chancellor. I entertain no doubt in regard to the usury. The answers of the several defendants are clearly evasive on that point; especially the answer of Prentiss.

The effect of usury, under our statute, is not to avoid the contract, as is the case with many statutes on that sub-
[*531] ject; but to reduce the amount which the usurer is *entitled to recover, to the money actually loaned, with legal interest. Laws 1843, p. 54.

Phelps, as surety for complainant, having paid the judgments confessed by himself and complainant to Prentiss, and stayed by Price, for the money loaned, and usury,—with full knowledge of the usury,—the question is, whether, under the

mortgage to indemnify himself and Price, he can recover the excess of interest paid by him, as well as the money actually loaned by Prentiss to complainant, with interest.

If the judgments had been void, in consequence of the usury, he would have paid them in his own wrong; and, as it was, he might have filed his bill in this Court, and on paying what was actually loaned, with interest, have obtained relief against the usury. But was he bound to do so? Was it not complainant's duty to have done it, if he intended to object to paying the illegal interest? It belongs more properly to a principal to protect his surety, than a surety his principal. The bill charges collusion between Phelps and Prentiss, but there is no evidence of it. On the contrary, Phelps appears to have acted in good faith, in paying the judgments.

Phelps paid the judgments in August, 1841. He was then, and not till then, damnified. The mortgage he executed to Prentiss to get his property released from the executions, was no satisfaction of the judgments. It was not received in satisfaction, or payment, but as securety merely. Phelps and Price, consequently, were not damnified when they foreclosed the mortgage from complainant to them by advertisement and sale under the statute. The statutory foreslosure amounted to nothing; and complainant has a right to redeem, on paying the amount of the two judgments, with seven per cent. interest, and defendant's costs in the present suit. The interest due when *the judgments were paid by Phelps [*532] to be added to the principal, and interest to be computed on the whole amount from that time forward. The ten per cent. interest paid by Phelps on the judgments, in consideration of time, was usurious, and paid in his own wrong; and cannot be allowed to him or his assignee, Crissman, who is the party beneficially interested in the mortgage.

There must be a reference to a Master to compute, on the principles above stated, the amount due on the mortgage executed by complainant to Phelps and Price; and on the coming in of the report, a decree must be entered permitting complainant to redeem within six months, &c.

Amanda Emmons *v.* Nelson H. Emmons.

Where a bill for a divorce is taken as confessed, and a reference is had to a Master to take proof of the material facts in the bill, he must report *his opinion* on them, with the testimony taken.

The object of a reference in this class of cases, is to guard against collusion by the parties; and the Master, in addition to the questions asked by complainant, should examine the witnesses himself, that he may give his opinion understandingly.

Bill for a divorce for adultery.

Defendant not having appeared in the cause, the papers were submitted to the Court, by

J. K. Rugg, for complainant.

The Chancellor. The 101st rule of the Court provides, that, when a bill for a divorce is taken as confessed, or the facts charged therein are admitted by the answer, the [*533] *complainant may apply to the Court on any regular motion day, or in term, upon due proof of the regularity of the proceedings to take the bill as confessed, or upon the bill and answer, for a reference to a Master to take proof of all the material facts charged in the bill, and to report such proof to the Court, *with his opinion thereon*. By the 100th rule, the bill is required to be sworn to, and, if it be for a divorce on the ground of adultery, to contain an averment that the adultery charged in the bill was committed without the consent, connivance, privity, or procurement of complainant: and that complainant has not voluntarily cohabited with defendant, since the discovery of such adultery.

The statute provides no divorce shall be granted, unless complainant, or petitioner, shall prove his or her residence in the State for one year next preceeding his or her application; or that the marriage was solemnized in the State, and the applicant has resided therein from the time of such marriage, to the

time of his or her application. R. S. 337, § 6; Laws 1842, p. 116; Laws 1844, p. 74.

In the present case, there is no positive evidence of complainant's residence in the State, for the year next preceding her application. It may, perhaps, be inferred from a portion of the testimony taken by the Master for another purpose; but there should be some better evidence of a fact so easily proved, and, where it exists, so susceptible of positive testimony, than an inference, for the Court to base its decision on.

The Master has reported the proofs taken by him, but not his *opinion thereon*, as required by the 101st rule. The object of a reference in this class of cases is to guard against collusion between the parties; and the Master is, therefore, not only required to take proof of all the material facts charged in the bill, but also to report the same, *with his opinion thereon, to the Court. It is his duty to examine the witnesses himself, as well as to take down their answers to such questions as may be asked them by complainant, so as to enable him to give his opinion understandingly, as to the truth of every material allegation or averment in the bill. 7 Paige R. 589; 9 Paige R. 589. [*534

Neither is there any proof complainant has not voluntarily cohabited with the defendant since the discovery of the adultery. The Master should have required testimony as to the discovery of the adultery by complainant, and whether there had been a condonation of the offense, by a voluntary cohabitation since.

The only witness to the offense is a *particeps criminis*, who is, nevertheless, a competent witness, but whose testimony should be corroborated by some collateral evidence. Poynter on Marr. and Div. 198, note p.

It must be referred back to the Master to take further proofs, and to make a full report, stating therein his opinion as to the truth of every material fact stated in the bill.

[*535] *George Fox and Charles Coleman *v.* Elisha B. Clark, John Drew, William H. Willis, Alfred Willis, Edward Willis and Eurotas P. Hastings.

A deed made to defraud creditors is void, and does not, as against them, divest the fraudulent grantor of his title, before the property has been conveyed by the fraudulent grantee, for a valuable consideration, to a third person without notice of the fraud; when the deed becomes operative against creditors, for the purpose of protecting the innocent purchaser and vesting the title in him.

A mortgage given by a fraudulent grantor to a creditor, to secure the payment of a judgment, is good against the fraudulent grantee, and all claiming under him with notice of the fraud.

It is also good against a creditor of the fraudulent grantor, who has had the assignment set aside, but who had acquired no lien on the property for his debt prior to the mortgage.[1]

The bill in this case was filed December 13th, 1842, to foreclose a mortgage executed by the defendant Clark, to complainants, on the 20th day of August, 1839, and recorded on the 23d day of September following. The mortgage was given to secure a judgment for $1,462.09, recovered June 20th, 1838, by complainants, against Clark and one Joseph McCrary, in the Circuit Court of the United States for the District of Michigan.

On July 11th, 1838, the defendants Willis recovered a judgment in the same Court, for $953.83, and costs, against Clark and McCrary, on which execution was issued on the 27th day of the same month, but nothing was collected thereon. On June 9th, 1838, previous to the rendition of either of the above judgments, Clark assigned all his property to one Dallee, in trust for his creditors. In October, 1840, the Willises filed a bill on the equity side of the Circuit Court, to set aside the

[1] This case was reversed in 1 Mich., 321, Fox *v.* Willis. See, also, Cleland *v.* Taylor, 3 Mich., 206.

assignment, which embraced the mortgaged premises, as fraudulent against *creditors; and obtained a decree in [*536] March, 1842, declaring the assignment null and void, and appointing a receiver; who, on August 2d, 1842, sold the premises in question at public auction, when they were purchased by the Willises.

S. Barstow and H. N. Walker, for complainants, insisted that the assignment from Clark to Dallee was void, and not voidable merely, and had been so declared by a competent tribunal; and that the mortgage to complainant was therefore in all points good, the title then remaining in Clark, who was justly indebted to them. That the defendants Willis and Drew were affected with notice by the recording of it, at the time when they commenced their proceedings to set aside the assignment; and the deed from Drew was made subject to the title and interest of complainants under the mortgage.

A. D. Fraser and A. Davidson, for defendants Drew and Willis, contended that the assignment was merely voidable, and complainants, or any other creditors of Clark, could only take advantage of its being so, by proceeding to impeach it; that defendants, having proceeded to impeach it and obtained a decree setting it aside, and also a sale, and claiming under that sale, have obtained a perfect title to the premises, clear of complainants' mortgage.

The Chancellor. The deed from Clark to Dallee is conceded to be fraudulent as to creditors by all parties. Both complainants and the Willises are constrained to admit it, to make out a good title in themselves. Both claim a right to the mortgaged premises as creditors of Clark;—complainants by virtue of their mortgage, and the Willises under the receiver's deed. The controversy is one between creditors for the property of an insolvent debtor.

*The statute declares every conveyance or assignment [*537] made with intent to hinder, delay, or defraud creditors,

or other persons, of their lawful suits, damages, forfeitures, debts, or demands, as against the persons so hindered, delayed or defrauded, shall be *void*. R. S. 331, § 1, Ch. 3. Tit 6. Part 2.

The fifth section of the same chapter is in these words: "The provisions of this title shall not be construed, in any manner, to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that he had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering *void* the title of such grantor."

Taking the two sections together, their meaning, it seems to me, is this. Every conveyance made to hinder, delay, or defraud creditors, as against such creditors, is wholly void; or, in other words, as between the parties to such conveyance, and the creditors of such fraudulent grantor, (although it is otherwise as between the parties to the conveyance,) the title to the property conveyed remains in the grantor, until the property has been conveyed by the fraudulent grantee for a valuable consideration, to a third person, without notice of the fraud; when the fraudulent conveyance, by the fifth section of the act, is made operative against creditors, for the purpose of protecting the innocent purchaser, and vesting the title in him.

The first section declares the conveyance or assignment void generally against creditors, and without any restriction or limitation whatever;—not void as between the parties to it, but void against the creditors of the fraudulent grantor. The fifth section, however, is a limitation on the first section, and restricts its operation to the fraudulent grantee, and persons claiming under him with notice.

[*538] *On the argument it was insisted on the part of complainants that the assignment to Dallee was *absolutely void*, as to Clark's creditors, and for the defendants that it was *voidable* only. In support of the latter proposition, the opinion of the Vice Chancellor in *Henriques* v. *Hone* was referred to: 2 Edw. R. 120. In that case the Vice Chancellor says, such deeds are voidable only as to creditors or purchasers who may think proper to impeach them; and are not utterly void. Thus, as against a fraudulent grantor, the conveyance is effectual to

pass the title, and he and his representatives are not at liberty to set up a claim in opposition to the deed; *Osborn* v. *Moss*, 7 J. R. 161: and, for all the purposes of a valid title in a *bona fide* purchaser under a fraudulent grantee, such grantee is, in contemplation of law, vested with a legal and perfect title." If, by using the word *voidable* instead of *void*, as to creditors, the Vice Chancellor intended to be understood as merely saying the deed was not a *nullity*, but was good as between the parties, and for the purpose of vesting a good title in a *bona fide* purchaser without notice, before creditors had acquired a lien on the property for the payment of their debts; he but uses the word *voidable* to express what we understand to be the meaning of the first section of the act, taken in connection with the fifth section, in declaring all conveyances made to defraud creditors shall be *void*. It is supposed, however, the Vice Chancellor meant something more than this. That, by declaring such deeds voidable only, as to creditors, he meant the title, not only as between the fraudulent parties to the deed, but also as to creditors, passed out of the fraudulent grantor, and vested in the fraudulent grantee, who could be divested of it only by the decree or judgment of a court, at the suit of creditors declaring the deed fraudulent and void as to them. There are, I admit, several parts of the opinion *that will bear this construction. He says, "The entire [*539] interest and estate of a fraudulent grantor, passes from him by such a conveyance; which would not be the case if it were a nullity;—while the title must vest somewhere, for the law does not permit the fee to be an abeyance. It vests by consequence, in the grantee, subject to be divested whenever the creditors or persons aggrieved think proper to call in question the validity of the transaction, and show the deed or conveyance to be fraudulent. And when this is done, the judgment or decree of the Court is interposed, and, by force of the statute, such judgment or decree declares the instrument to be void, and void *in toto*, as respects those who have impeached it, and giving to them the benefit of their legal diligence, &c.

"Upon these principles, it appears to me impossible to con-

sider the title to the assigned property as thrown back upon the assignor, Moffat, and as taking a new start from him, when the assignment to Hall and Swan was declared void as to the creditors who had taken measures to impeach it. The effect of the decree was only to divest the assignees of their right and control over the property by virtue of the assignment, so as to have the property applied to lawful purposes, namely, to the payment of the debts of the assignor owing to such of his creditors as did not choose to submit to his terms, but who pursued the legal remedies, and thereby acquired preferences over others, and priorities of payment out of his estate," &c.

"The practice upon a decree of requiring a release or conveyance by a person holding under a *voidable* deed, upon setting it aside, shows the understanding to be that the legal title, at least, remains in him, and does not return and revest in the original grantor. &c.

"But, supposing the title to the property to have reverted to Moffat, and that the receiver takes it as coming [*540] *directly from him," &c. "Although the assignment may be void as to creditors generally, legal measures are still necessary on their part, in order to avoid it," &c.

If the title as to creditors be in the fraudulent grantee, and he can be divested of it only by a judgment or decree declaring the conveyance fraudulent and void, as to creditors, it would seem to follow, as a necessary consequence, that a creditor, by obtaining judgment and taking out execution and selling the property so fraudulently conveyed, and purchasing it himself, would not acquire a title. For, if the title as to creditors is not, in contemplation of law, still in the fraudulent grantor, how could a creditor, by such means, obtain a title? And yet it has been every day's practice, and has never, to my knowledge, been questioned. *Hyslop* v. *Clark*, 14 J. R. 458; *Austin* v. *Bell*, 20 J. R. 442; *Jackson* v. *Roberts' executors*, 11 Wend. R. 422; *Drinkwater* v. *Drinkwater*, 4 Mass. R. 354; *Reiker* v. *Ham*, 14 Mass. R. 137. These cases show the deed is void against creditors; and that they may levy upon the property and sell it to pay their debts, the same after such

fraudulent conveyance as before, any time before it has been conveyed by the fraudulent grantee to a *bona fide* purchaser without notice.

Were it not for the fifth section of the act, a good title could, in no case, be made against creditors, through the fraudulent conveyance; not even in favor of a *bona fide* vendee for a valuable consideration without notice. It was so decided by the Supreme Court of Errors of the State of Connecticut, in *Preston* v. *Crofut*, 1 Day R. N. S. 527, *note*, on the statute of that State, which contains no provision in favor of *bona fide* purchasers. A like decision was made by Chancellor Kent, in *Roberts* v. *Anderson*, 3 J. C. R. 371. It is true the decision of the Chancellor in that case was afterwards reversed by the Court of Errors; *but the only difference between the Chancellor and the [*541] Court of Errors was that, while the Chancellor held the proviso in favor of *bona fide* purchasers in their statute did not extend to such purchasers from a fraudulent grantee to defraud creditors, the Court of Errors held the reverse. Ch. J. Spencer, in controverting the ground taken on the argument of the case in the Court of Errors, says: "In my judgment, the error of those who assert, that a fraudulent grantee under the 13th of Eliz. takes no estate, because the deed is declared to be *utterly void*, consists in not correctly discriminating between a deed which is an absolute nullity, and one which is voidable only. No deed can be pronounced, in a legal sense, utterly void, which is valid as to some persons, but may be avoided, at the election of others." *Anderson* v. *Roberts*, 18 J. R. 527. Again he says, "I trust it has sufficiently appeared, that the fraudulent grantee takes the entire interest of the fraudulent grantor, and that the deed is voidable, at the instance of the creditor, not legally and strictly void." P. 531. But he does not thereby mean the estate, as against creditors, is so vested in the fraudulent grantee, that he can be divested of it only by the decree or judgment of a Court. For, in another part of his opinion, he says: "I must be understood, as qualifying the right of the purchaser from the fraudulent vendee. It must

be prior, in point of time, to a sale for a valuable consideration, by the fraudulent grantor; and it must, also, be prior to a sale on execution, at the suit of the creditor." P. 532. The Chief Justice uses the word voidable, in contradistinction to utterly void for all purposes; as the deed, if void *in toto*, could not have the effect of vesting a good title in an innocent purchaser without notice.

The case of *Anderson* v. *Roberts*, is principally relied on by the Vice Chancellor, in *Henriques* v. *Hone*.

[*542] *This last case was appealed to the Chancellor, and from him to the Court of Errors, in both of which events, the decree of the Vice Chancellor was affirmed; but for a different reason from the one chiefly relied on by the Vice Chancellor. The Ch. Justice, in delivering the opinion of the Court of Errors, says: "The Chancellor confines himself, in his opinion, to the facts of the case, and says: 'The defendant, Hone, having assented to the assignment by executing the same, (his assent) it is not void as to him.' This is the true ground upon which the decision should rest, and upon this ground it cannot be controverted." *Hone* v. *Henriques*, 13 Wend. R. 242. Neither the Chancellor nor Court of Errors adopted the legal principles laid down by the Vice Chancellor, in affirming the decree.

In *Austin* v. *Bell*, where a debtor had made an assignment for the benefit of creditors, which was void as to them, in consequence of its containing objectionable features, it was held, a judgment creditor, who had not given his assent to the assignment, might take out execution, and levy on the property in possession of the assignee, and sell it in satisfaction of his debt. That case is like the one before the Court, with this exception: complainants, instead of taking out execution and levying on the property assigned by Clark to Dallee, and selling it, took a mortgage from Clark on a part of the property assigned, for the payment of their judgment.

If property fraudulently conveyed may be taken and sold on execution, by a creditor, why may he not take a mortgage on the same property from his debtor, for the security of his debt?

It seems difficult to assign a reason why he should not. Why drive him to a judgment and execution? Why not allow the fraudulent debtor to repent, and, so far as in his power, to retrace his steps? *Why render the title of the fraud- [*543] ulent grantee more secure, by fortifying it against the assaults of creditors, unless they are made from a particular quarter? With a mortgage from a fraudulent grantor, the creditor is in as good a position to test the validity of an assignment, with a fraudulent grantee, as he would be with a judgment and execution levied on the same property.

It is said it will enable fraudulent grantors to give a preference among creditors, after a suit has been commenced to test the validity of an assignment. This is true; but a debtor has a right to prefer one creditor to another, any time before the latter has obtained a lien on the debtor's property for his debt. It not unfrequently occurs, a creditor who has prosecuted for his debt, when on the point of obtaining judgment, is met with an assignment giving other creditors a preference over him. There is no such ground for complaint in the present case. The mortgage from Clark to complainants was executed on August 20th, 1839; and the Willises did not file their bill until October, 1840. In March, 1842, they obtained a decree, declaring the assignment null and void, and appointing a receiver; who sold the mortgaged premises at public auction, to the Willises, on the 2d of August, 1842. The receiver, and the Willises, as purchasers from him, took the premises subject to the mortgage. There must be a reference to a Master to ascertain the amount due on the mortgage, and, on the coming in of his report, the usual decree must be entered.

[*544] *Pascal D. Webb *v.* Israel Williams and Elizabeth Ann, his Wife, Edward Wilmot, Martha Wilmot, and Mary C. Wilmot.

Where W. W. gave a mortgage on land, and the mortgage was foreclosed at law by advertisement and sale under the statute, but, before the redemption expired, he died, leaving a widow, who sold the land to P. D. W. by a warranty deed, in consideration of his paying her $25 and what was due on the mortgage; and P. D. W. redeemed the land under the mortgage sale, by paying what was due, and the heirs of W. W. afterwards brought an action of ejectment against P. D. W. to recover possession of the land: *it was held*, he had a lien on the land for the redemption money paid by him, with interest, less the use and occupation of the premises over and above improvements.[1]

William Wilmot, deceased, in his lifetime, being seized of two equal undivided third parts of the W. half of N. E. quarter of section 19, T. 1 S., R. 6 E., on the 8th day of February 1831, mortgaged the same to Stephen Goodman for $200, Goodman, in July, 1832, assigned the mortgage to Mrs. Fuller as security for $127. In November of the same year, Wilmot exchanged the land with Joseph Gillett, for two equal undivided third parts of the W. half of S. E. quarter of section 7, in the same town; and, to enable him to make a good title to Gillett, it was agreed the mortgage should be transferred from the land on section 19, to the land on section 7, and Mrs. Fuller acknowledged satisfaction of the mortgage on section 19; when a new mortgage of the land on section 7 was executed by Wilmot to Goodman, who assigned it to Mrs. Fuller as security as aforesaid. Goodman afterwards parted with his entire interest in the mortgage to Mrs. Fuller, who foreclosed it by advertisement and sale under the statute, and became herself the purchaser, and received a certificate from the sheriff for a deed, at the expira-
[*545] tion *of two years, unless the land was redeemed within

[1] See Johnson *v.* Johnson, *ante*, 331.

that time. Wilmot soon after died intestate, leaving Mary Ann Wilmot, his widow, who, a few days before the redemption expired, sold the land to Webb, and executed a warranty deed of it to him, in consideration of what was due to Mrs. Fuller on the mortgage foreclosure, which was paid by Webb, and of $25 paid to herself. In 1842, defendants, who are the heirs at law of William Wilmot, deceased, brought an action of ejectment against Webb for the land, and recovered a verdict in their favor; when complainant filed his bill in this Court, stating the loss of the mortgage, and that it had not been recorded, and that he could not, on that account, make out his defense at law; and averring that the payment to Mrs. Fuller was a purchase of her interest under the mortgage sale, &c.; and praying defendants might release, or be decreed to repay him what he had paid Mrs. Fuller. The answer denied most of the statements of the bill; and testimony was taken on both sides, which it is unnecessary to state.

O. Hawkins, for complainant.

J. Allen, for defendants.

The Chancellor. I have no doubt, from the testimony, the Goodman mortgage was changed from the W. half of N. E. quarter of section 19, T. 4 S., R. 6 E., to the W. half of S. E. quarter of section 7, in the same town, when complainant and William Wilmot exchanged lots. Goodman is undoubtedly mistaken in his evidence. No one, I think, can read over the testimony, without coming to this conclusion.

But the money paid by complainant to Mrs. Fuller was in discharge of the mortgage, and to redeem the premises from the effect of the statutory foreclosure; and not for *her interest as purchaser at the morgage sale. Com- [*546] plainant supposed, by purchasing the lot of Mrs. Wilmot, after the death of her husband, and taking a deed from her, and redeeming under the mortgage sale, he would acquire a good title. In this he was mistaken. She had no interest to

convey, save her right of dower, which alone passed by the deed. On the death of her husband, the equity of redemption descended to his heirs, the defendants, subject to her right of dower. But that complainant and Mrs. Wilmot at the time supposed the one was purchasing, and the other selling, an estate in fee simple, is evident from the conveyance itself, which is a warranty deed, and purports on its face to convey an absolute estate of inheritance.

Whether the mistake is one of law or fact is wholly immaterial, so far as the present case is concerned. For, conceding it to be a mistake of law, defendants, as heirs of Mr. Wilmot, under whom they claim, are strangers to the transaction in which the mistake occurred, and cannot, therefore, claim any benefit from it; and, as heirs of Mrs. Wilmot, this Court will not permit them to reap any advantage from the mistake, without keeping good her covenant of warranty.

By giving complainant a lien on the land, for what he paid to Mrs. Fuller, no injury is done to defendants. The money was paid to discharge a mortgage given by their father, after a statutory foreclosure of the mortgage, and before the time of redemption had expired. Had the mistake not occurred, they would have lost all interest in the land at that time; but, as it is, they still have the right of redemption. To ask more is manifestly unjust.

In *Bingham* v. *Bingham*, 1 Ves. Sen. R. 126, complainant having purchased an estate of defendant, which it after-
[*547] wards appeared belonged to him at the time of the *pur-chase, defendant was decreed to return the purchase money, with interest from the time of filing the bill. The cancellation of a deed, under a mistake as to the legal effect of a will subsequently executed, will be relieved against. *Perrott* v. *Perrott*, 14 East R. 423. Why not the cancellation of a mortgage, the party procuring it supposing he had a good title to the land under a deed executed at the time? Lord Ellenborough, C. J., in delivering the opinion of the Court in *Perrott* v. *Perrott*, says: "Mrs. Territt mistook either the contents of her will, which would be a mistake in fact; or its

legal operation, which would be a mistake in law; and in either case, we think the mistake annulled the cancellation. *Onions* v. *Tyrer*, 1 P. Wms. 345, and 2 Vern. 742, is a strong authority that a mistake in point of law may destroy the effect of a cancellation. And, when once it is established, as it clearly is, that a mistake in point of fact may also destroy it, it seems difficult upon principle to say that a mistake in point of law, clearly evidenced by what occurs at the time of cancelling, should not have the same operation."

Defendants must be restrained from proceeding at law to recover possession of the land; and there must be a reference to a Master to ascertain what is due complainant for redemption money paid by him, with interest, less the use and occupation of the premises, over and above all permanent improvements made by complainant, and Mrs. Wilmot's right of dower during her life.

INDEX.

ACKNOWLEDGMENT.

Where the certificate of the acknowledgment of *femes covert* to a mortgage subsequent to the act of 1840, declared that they executed it without fear or compulsion *of their husbands, it was held*, that such certificate was no evidence, either in law or equity, of such an acknowledgment by them as the act of 1840 requires, to bar their right of dower. *Barstow* v. *Smith*, 394

ADMINISTRATOR.

1. Where the person who executed a trust deed for the benefit of his creditors, offered, as administrator, to prove a debt due from him to the estate, *held*, that it was incompetent for him to do so; but that the next of kin of the deceased, or others entitled to the money due from him as administrator, might come in and claim under such deed, as his individual creditors. *Suydam* v. *Dequindre*, 23

2. An administrator appointed in another State has no interest in the real or personal property of his intestate here. Nor has an administrator appointed in this State any interest in, or authority over, real estate, unless the personal property of the deceased is insufficient to pay his debts, and then he can only dispose of it after express permission given by the judge of probate, on application made for that purpose. *Thayer* v. *Lane*, 200

3. Where an estate had been represented insolvent by an administrator *de bonis non*, a motion was granted staying proceedings on execution, for balances due on certain mortgage foreclosures, (not being such debts as are preferred by law,) which had been levied before such representation of insolvency. *Quackenbush* v. *Campbell, adm. &c.*, 525

4. It is immaterial whether the estate be represented insolvent by the original administrator, or the administrator *de bonis non;* the provisions of the statute applying to the former, apply also to the latter, where there is no express provision to the contrary. *Id.*, 525

ADMINISTRATOR.—*Continued.*

5. No time is limited by statute, within which an estate must be declared insolvent by an executor or administrator. *Id.*, 525

ADMISSIONS.

1. The admissions in a bill or answer, to be conclusive on the party making them, must be full and unequivocal. They must not be inferred from other admissions, unless the express admission is so closely connected with the one to be inferred, that to disprove the latter would disprove the former. *Schwarz* v. *Sears*, 19

2. Where a defendant permits a bill to be taken as confessed against him, it is an admission on his part of every material fact stated in it. *Ward* v. *Jewett*, 45

See DIVORCE, 1.

ADVERSE POSSESSION.

Where there is an adverse possession, the legal title cannot pass by a conveyance from a person out of possession. *Godfroy* v. *Disbrow*, 260

AGENCY.

1. The possession of State property by the authorized agents and officers of the State, is the possession of the State. *Michigan State Bank* v. *Hastings*, 9

2. Equity will not decree the specific execution of a written contract for the sale of land made by a special agent, who has exceeded his authority. *Chamberlin* v. *Darragh*, 149

3. Neither will it require the agent to convey his equitable interest in the land as *cestui que trust*, he having acted only as the agent of the trustee in selling the land, although the contract on its face, does not disclose the agency: the bill charging that the contract was made by him as the agent of the trustee, and not that it was made by him in his own right. *Id.*, 149

4. Where an agent, acting within the scope of his authority, does a thing which, standing alone and by itself, would be binding on his principal, and at the same time does something more, which he was not authorized to do, and the two are not so interwoven with each other that they cannot be separated, but constitute different parts of the same contract, that which the agent was authorized to do, is binding on his principal, and that only which he was not authorized to do, is void. *Hammond* v. *Michigan State Bank*, 214

5. A person who deals with an agent is bound to inquire into his authority, and ignorance of the extent of the agent's authority, is no excuse. *Id.*, 214

6. The declarations of an agent, made at the time of doing an act within the

AGENCY.—*Continued.*

scope of his authority, and relating to the subject matter of the act, are evidence, as a part of the *res gestæ;* but statements subsequently made by him are not, because the latter are made without authority, and, for that reason, stand on the same footing with the declarations of another person. *Benedict* v. *Denton,* 336

7. An agent, whether of the public or of individuals, who is authorized to sell property for the best price that can be obtained for it, cannot become the purchaser, either in his own name or that of another, whether the sale be public or private. *Ingerson* v. *Starkweather,* 346

See EVIDENCE, 8. MICHIGAN STATE BANK, 1. MORTGAGEE, 37.

ALIMONY.

1. When allowed. *Sawyer* v. *Sawyer, note, p.* 53

2. In a suit by or against a wife, for a divorce, if she have no separate property of her own, the Court, when necessary, on petition, will grant her temporary alimony pending the suit, and require her husband to advance money to enable her to prosecute her suit, or make her defense. *Story* v. *Story,* 421

3. The affidavit of the husband, denying the ground on which the wife asks a divorce, is no answer to an application for alimony during the suit, but may be read to aid the Court in the exercise of its discretion as to the amount to be allowed. *Id.,* 421

AMENDMENT.

See PRACTICE, III. 10, 11, 12, 13.

ANSWER.

See EVIDENCE, 10, 11, 12, 13. PLEADING, V. PRACTICE, V.

APPEAL.

The right of appeal is a statutory right, and, where a party has failed to comply with the provisions of the statute, within the time prescribed, the Court will not allow a re-entry of the decree to enable him to appeal. *Weed* v. *Lyon,* 77

ASSIGNMENT.

1. The assignment of a debt secured by a mortgage, carries with it the mortgage, as an incident to the debt, although there is no mention made of the mortgage in the assignment. So, the assignment of a part of a debt, or of one of several notes secured by a mortgage, carries with it a proportional interest in the mortgage, unless it is agreed between the parties, at

ASSIGNMENT.—*Continued.*

the time, that no interest in the mortgage is to pass to the assignee. *Cooper* v. *Ulmann*, 251

2. Where there are several notes falling due at different times, the fact that one note becomes due first, will not, of itself, give it a preference over the rest, where the mortgaged premises are insufficient to pay the whole. *Id.*, 251

3. The assignor may, if he see fit, give the assignee a priority of payment; but the law gives no such priority, where there is no understanding or agreement between the parties to that effect. *Id.*, 251

4. An assignee of a contract cannot insist upon fraud used in the making of the contract on the party under whom he claims. *Carroll* v. *Potter*, 355

5. Where an assignment of a debt is made to defraud creditors, they only can take advantage of the fraud to set it aside, and it is good against all others; and the debtor cannot set it up as a defense to a suit by the assignee. *Morey* v. *Forsyth*, 465

See JUDGMENT CREDITOR'S BILL, 22, 23 26; MORTGAGE, III.

BANK.

1. Where the charter of a bank prohibited the discounting of notes for stockholders to pay installments on their stock, and a note for $70,000 and a certificate of deposit on which $12,000 was due, were discounted to enable an individual to purchase a controlling interest in the bank, and to pay the balance due the bank on the stock purchased by him, and a bill was filed to restrain a suit brought by the bank on the note, and to have the note and certificate given up and canceled; upon demurrer it was *held*, that the bill should not be sustained, and that the parties should be left to their remedy at law. *Welles* v. *River Raisin and Grand River R. R. Co.*, 35

2. Where a bank had power under its charter to take and hold lands for the convenient transaction of its business, and to secure debts, but for no other purpose, *it was held*, it had no right to purchase lands for the purpose of selling them again; and the Court refused to assist it in enforcing a contract made with that intent. *Bank of Michigan* v. *Niles*, 99

3. A purchase after the contract was made, in part performance of it, will not change the case. *Id.*, 99

4. A bank may take a mortgage for a debt *due* to it, with *seven* per cent. interest, (that being the legal rate of interest,) notwithstanding it is prohibited by its charter from taking "more than *six* per cent. per annum in advance on its *loans or discounts*." *Bailey* v. *Murphy*, 424

See CORPORATION, 3, 4. MICHIGAN STATE BANK, 1, 2.

BILL.

See PLEADING, II. PRACTICE, II, 6; III.

COMPROMISE.

Where two parties claim the same land under conflicting titles, and there is a doubt as to which title is valid, that fact is sufficient consideration for an agreement to compromise and divide the land; and a specific performance of such agreement, though not in writing, will be decreed, where the party seeking it has acted fairly, and there has been a part performance to take it out of the statute of frauds. *Weed* v. *Terry*, 501

CONDITION.

1. Where time has been extended for the performance of conditions, a party seeking to avail himself of the extension, must allege a readiness to perform within the time as extended, and notice thereof. *Trowbridge* v. *Harleston*, 185

2. A court of equity may relieve against the breach of a condition precedent in the nature of a penalty; and there is no good reason why it should not relieve against the breach of a condition precedent, when it would against a condition subsequent. *Chipman* v. *Thompson*, 405

3. The substantial difference which governs courts of equity, in cases of conditions, is not whether the condition be precedent or subsequent, but whether a compensation can, or cannot be made. *Id.*, 405

4. The Court is not bound, in all cases where a compensation can be made, to give relief; for the party seeking relief may have so conducted himself as to have lost all claim to its interposition; but when this is not the case, and it is equitable under the circumstances that relief should be given, it is competent for the Court to give it. *Id.*, 405

CONSTRUCTION.

1. Contracts are to be construed according to the intention of the parties, as expressed in them. *Bronson* v. *Green*, 56

2. Where several contracts are executed by the same parties at the same time, and relating to the same matter, they are to be construed together. *Id.*, 56

3. Where one writing refers to another, the intention of the parties is to be gathered from the two construed together. *Id.*, 56

4. Where one contract grows out of another to which it refers, and both are in writing, the first may be looked into to ascertain the intention of the parties in the latter, if it is not clearly expressed therein. *Id.*, 56

5. Public grants are to be construed strictly, and nothing passes under them by implication. *La Plaisance Bay Harbor Co.* v. *City of Monroe*, 155

CONSTRUCTION.—*Continued.*

6. In construing an instrument, the whole of it should be considered, and a construction of a detached part, without reference to the rest, is erroneous. *Norris* v. *Showerman*, 206

7. An agreement by a lessee in a memorandum signed by him at the foot of the lease, before it was assigned, constitutes a part of the lease. *Id.*, 206

8. Where water was leased in the following words: "The right and privilege of drawing from the west side of a race now making by the said party of the first part, in Ypsilanti aforesaid, and leading to his new saw-mill, at any place within sixteen rods from the head-gate of said race, as much water as will run through an aperture of two feet square, under a head of four feet from the top of said aperture," &c., *it was held*, the words "under a head of four feet from the top of said aperture," must be construed as referring to the location of the aperture, and not to the quantity of water leased; and that the lessee was entitled to as much water as he could take through an aperture two feet square, made in the side of the race, not lower down than four feet below the surface of the water in the race; and not to as much water as would pass into space, through such an aperture, under a head of four feet above the top of the aperture. *Id.*, 206

9. The intention of parties to an instrument, when that intention is apparent from the whole instrument, and not repugnant to any rule of law, will control the meaning of a particular word or phrase, unguardedly used, and seeming to indicate a different intention. *Bird* v. *Hamilton*, 361

10. It is the intention of parties, rather than the language employed to express their intention, that courts chiefly regard. *Id.*, 361

11. The Court must judge of the intent of the legislature, from the language used to express that intent; and where the language is clear and explicit, and susceptible of but one meaning, and there is nothing incongruous in the act, the Court is bound to suppose the legislature intended what their language imports. *Barstow* v. *Smith*, 394

See GUARDIAN AND WARD, 1. LANDS AND LAND TITLES, 1, 2, 4, 5. MICHIGAN STATE BANK, 1. MORTGAGE, 36, 37, 38. NAVIGABLE WATERS, 1, 2. ORDINANCE OF 1787, 1, 2, 3. REGISTRY, 2, 3.

CORPORATION.

1. The Legislative Council of the Territory of Michigan had power to pass acts of incorporation, which were valid until disapproved by Congress. *Mercer* v. *Williams*, 85

2. Where a railroad company had, in good faith, obtained an assessment of damages by a jury, on land which was necessary for their road, long before they wanted the use of it, and afterwards, when any delay would have been injurious to them, and while the confirmation of the inquisition was still pending in the Supreme Court, to which it had been reserved, had tendered the damages assessed, and proceeded to use the land, the

CORPORATION.—*Continued.*

Court, under the circumstances, refused to enjoin them from constructing the road upon it, although the inquisition was not valid until confirmed; inasmuch as they could only be delayed, and could not be prevented from finally obtaining the land. *Id.*, 85

3. Corporations have such powers and capacities as are given to them, and none other; and every abuse of such powers is a violation of the law of their being, and a forfeiture of their franchises. The establishment of an agency or office at a place not authorized by the charter, was held to be a violation of it. *Attorney General* v. *Oakland County Bank*, 90

4 Under the act of June 21, 1837, this Court has jurisdiction over banking corporations to restrain them by injunction from exercising their corporate powers, to appoint a receiver to take charge of their assets, and to decree their dissolution, in the following cases: 1st. When the corporation is insolvent. 2d. When it refuses to pay its debts. 3d. When it has violated any provision of its charter, or of any law binding on it. *Id.*, 90

5. The seal of a corporation is, itself, *prima facie* evidence that it was affixed by proper authority, and the contrary must be shown by the objecting party. *Benedict* v. *Denton*. 336

COSTS.

1. Where complainant was compelled by the improper conduct of the defendant, and without fault of his own, to come into Court for a settlement of partnership accounts, he was held entitled to costs. *Ward* v. *Jewett*, 45

2. Rule for computing costs and commissions on mortgage sales laid down. *Hart* v. *Linsday*, 72

3. It is the termination of the suit which entitles one party to costs against the other, and the law then in existence, is the rule by which they are to be ascertained. A different rule prevails between attorney and client. *Sawyer* v. *Studley*, 153

4. Affidavits are required in certain cases, before taxation of costs. *Id.*, 153

5. Rules of practice regulating the mode of applying for re-taxation of costs, and for setting aside the taxation for irregularity. *Reeves* v. *Scully*, 340

See PRACTICE, 7, 9.

CROSS BILL.

See PLEADING, 30.

DATE.

Where a date is given, both as a day of the week and a day of the month, and the two are inconsistent, the day of the month must govern. *Ingersoll* v. *Kirby*, 27

DEBTOR AND CREDITOR.

1. A debt due to two or more persons jointly, on the death of any of them, passes to the survivor or survivors, and not to the personal representatives of the deceased. *Cote* v. *Dequindre*, 64

2. A debtor has a right to prefer one creditor or class of creditors to another, and on assigning his property for the benefit of creditors, may lawfully require a particular creditor or class of creditors to be paid in full, although his other creditors, in consequence thereof, may not receive anything. *How* v. *Camp*, 427

3. A creditor may extend the time for his debtor to pay in, without discharging the sureties, if he, by the same agreement, in express terms, reserves his remedy against them. *Bailey* v. *Gould*, 478

4. A deed made to defraud creditors is void, and does not, as against them, divest the fraudulent grantor of his title, before the property has been conveyed by the fraudulent grantee, for a valuable consideration, to a third person, without notice of the fraud; when the deed becomes operative against creditors, for the purpose of protecting the innocent purchaser, and vesting the title in him. *Fox* v. *Clark*, 535

See Assignment, 5. Fraud, 10, 11. Judgment Creditor's Bill.

DECREE.

See Practice, IV.

DEED.

A deed executed without a witness, is good in equity as a contract for the sale of land, and may be enforced as such. *Godfroy* v. *Disbrow*, 260

See Fraud, 11. Registry, 2, 4.

DEFAULT.

See Practice, IV.

DEMURRER.

See Pleading, III.

DIVORCE.

1. Divorce will not be granted upon the admissions of a party unsupported by evidence, but the amount of evidence required varies with the danger of collusion. *Sawyer* v. *Sawyer*, 48

2. Sentence to hard labor in any prison, jail, or house of correction, for three or

DIVORCE.—*Continued.*

more years, is a good ground of divorce under the statute. *Johnson* v. *Johnson*, 309

3. Upon the dissolution of a marriage by divorce, or sentence of nullity, for any cause excepting adultery of the wife, she is entitled to the immediate possession of all her real estate, in the same manner as if her husband were dead. *Id.*, 309

See ALIMONY, 1, 2, 3. PRACTICE, 43, 44.

ELECTION.

1. Where complainant filed his bill in this Court for relief against a judgment at law, and subsequently sued out a writ of error to the Supreme Court on the judgment, an order was granted compelling him to elect in which Court he would proceed. *Webb* v. *Williams*, 452

2. On a motion to compel a complainant to elect between prosecuting his suit in this Court, and proceeding on a writ of error in the Supreme Court, for relief against a judgment at law, it is not necessary to serve a copy of the proceedings in the Supreme Court, with the notice of the motion. *Id.*, 452

EQUITY, PRIORITY OF.

1. Where the equities of parties are equal, and neither has the legal title, the prior equity will prevail. Nor will a subsequent obtaining of the legal title in right of another and not in one's own right, or with notice of the prior equity, aid the holder of the postponed equity. *Wing* v. *McDowell*, 175

2. Where equities are equal, and neither party has the legal title, or the legal title has been procured with a knowledge of the prior equity, the party who has the prior equity must prevail. *Norris* v. *Showerman*, 206

EVIDENCE.

1. If the allegations in a bill are sufficiently clear and positive to establish a fact without proof, it need not be adduced; otherwise, where they are vague and indefinite. *Ward* v. *Jewett*, 45

2. A witness is presumed to be competent until the contrary is shown. *Norris* v. *Hurd*, 102

3. Where a defendant, against whom a decree was sought, was examined as a witness, his deposition was suppressed; and it was *held*, that the examination did not operate as a release, but that a decree might still be had against him, if warranted by other evidence. *Id.*, 102

4. A complainant cannot examine as a witness a defendant against whom he seeks relief; if his answer is insufficient complainant should except, and if his testimony is sought to facts not stated in the bill, it should be amended. *Thomas* v. *Graham*, 117

EVIDENCE.—*Continued.*

5. The reservations of certain lands in the treaty of Saginaw are public donations, made by the Chippewa nation to individuals; and, where two persons of the same name claim a particular reservation, hearsay evidence is admissible to show for whom it was intended. *General hearsay* or public reputation at the time of the treaty among the Indians and those present at it, and among the Indians since that time and before any controversy arose, is good evidence for that purpose; so is evidence of what a person has said before such controversy arose, who was present at the treaty, and would be likely from the circumstances to know for whom the donation was intended, and is dead. But evidence of the declarations of a living person under such circumstances cannot be received. *Stockton* v. *Williams*, 120

6. What a witness has heard *post litem motam*, (by which is meant since the dispute has arisen, and not merely the commencement of suit,) is not evidence. *Id.*, 120

7. Where the register of deeds had received a check from complainant, in redemption of mortgaged premises, and given him a receipt for the same, as money, on behalf of defendant, who was the purchaser at the mortgage sale, he was held to be a competent witness for either party, as being equally liable to both. *Woodbury* v. *Lewis*, 256

8. The receipt of the register of deeds is not conclusive evidence of the payment of redemption money, as against a purchaser. *Id.*, 256

9. The fact that a mortgage for purchase money, given at the time the conveyance was made, was executed with all proper formality, raises the presumption that the deed (which in this case, had been lost, unrecorded) was likewise properly executed. *Godfroy* v. *Disbrow*, 260

10. The general rule is, that whatever is responsive to the bill is evidence for, as well as against the defendant. *Schwarz* v. *Wendell*, 267

11. If a fact stated in the bill, and answered by defendant, is material to complainant's case, or is a circumstance from which a material fact may be inferred, the answer, in such case, is responsive to the bill, and is evidence in the cause. *Id.*, 267

12. An answer may sometimes be evidence of a fact not stated in the bill, as when the bill sets forth part of complainant's case only, instead of the whole, and the part omitted, and stated in the answer, shows a different case from that made by the bill, and is not by avoidance merely. *Id.*, 267

13. Where an answer does not show a different case from that set up in the bill, but sets up new matter in avoidance, it is not evidence of such new matter. *Id.*, 267

14. A defendant cannot, by his answer, vary the terms of a written contract. *Id.*, 267

15. A bill, filed and sworn to by a person who is deceased, is evidence against his heirs to prove what might be proved by his declarations. *Chipman* v. *Thompson*, 405

EVIDENCE.—*Continued.*

16. Parol evidence cannot be received to add to, or vary the terms of a written instrument. It may be introduced for the purpose of showing fraud, or a mistake in drawing the instrument, when the fraud or mistake is set forth in the bill, and the relief asked is based upon it; but not otherwise. *Sutherland* v. *Crane*, 523

See Admissions, 1, 2. Corporation, 5. Divorce, 1. Mortgage, 3. Practice, 37.

EXECUTION.

An execution may be levied at any time on the return day, and the execution of the writ be completed by a sale of the property after that day.

See Judgment Creditor's Bill.

FRAUD.

1. Where, by treaty between the United States and the Ottawa and Chippewa Indians, the sum of $300,000 was set apart to pay claims against the Indians, to be allowed by commissioners, and, E. having a claim against them, H. procured its allowance to himself as purchaser of the claim, when he had no right to it, and received the money, *it was held*, that E. could not sustain an action at law against H. for the money, but that in equity H. would be considered a trustee for E. to whom the money of right belonged. *Edwards* v. *Hulbert*, 54

2. Where a party sold land for which other land was given in part payment, and was deceived in regard to the latter, the bargain was set aside and a reconveyance decreed. *Rood* v. *Chapin*, 79

3. When a party is entitled to rescind a contract, he should act promptly and not sleep on his rights, or take time to speculate on the course of events. If he goes on, with a full knowledge of his rights, recognizing the contract as still in force, and, by his acts and conduct, tacitly gives his assent to its execution in a manner different from the original understanding of the parties, he is not entitled, in equity, to have either the contract rescinded, or any relief inconsistent with what may fairly and reasonably be presumed, from his own acts, to have been assented to by him. *De Armand* v. *Phillips*, 186

4. Where the alleged fraud set up in defense of a bill, consists of a variety of circumstances, it should be taken advantage of by answer, and not by plea. *Carroll* v. *Potter*, 335

5. Fraud vitiates all contracts, at the election of the party injured; but he must make his election on the discovery of it, or within a reasonable time thereafter, whether he will rescind the contract, or consider it good, and resort to an action on the case for damages. *Carroll* v. *Rice*, 373

FRAUD.—*Continued.*

6. If the condition of the property has been so changed that the parties cannot substantially be placed back where they were before the sale, the vendee must seek redress by an action on the case. *Id.*, 373

7. A party seeking to set aside a conveyance on the ground of fraud, must be prompt in communicating the fraud when discovered, and consistent in his notice of the use he intends to make of it. *Id.*, 373

8. In a suit brought to set aside a bond and mortgage for purchase money, on the ground of fraud, the mortgagee being dead, and his estate insolvent unless the bond should be paid, the Court, although it refused, under the circumstances of the case, to rescind the contract, retained jurisdiction under the general prayer of the bill, on the ground that it could give more full relief than a court of law, and awarded an issue to ascertain the damage which complainant had sustained by reason of the alleged fraud. *Id.*, 373

9. The denial of fraud by a defendant, in his answer, is not conclusive upon the Court, if the facts and circumstances of the case are such as irresistibly to lead the mind to a different conclusion. When fraud is denied, it is not to be inferred from slight circumstances; but a denial of it does not preclude inquiry, or disarm the Court of its power, when, from the pleadings and proofs, it is satisfied of its existence. *How* v. *Camp*, 427

10. Where a conveyance was actually and not only constructively fraudulent, and a bill was filed by creditors to set it aside, and the grantee was compelled to account for moneys received by him out of the property, it was held that he should be credited with all taxes and improvements made by him, but for no advances made to his grantor, unless the money was used by the latter, before complainants filed their bill, to pay debts due from him at the time he made the fraudulent conveyance. *Id.*, 427

11. Where a deed of real estate was taken in the name of a son who was a minor, to keep it from the creditors of the father, and it was afterwards sold by the sheriff on an execution against the father, the son was decreed to release to the purchasers at the sheriff's sale. *Cutter* v. *Griswold*, 437

See Assignment, 4, 5. Debtor and Creditor, 4. Judgment at Law. Mortgage, 11, 12.

GUARDIAN AND WARD.

1. A petition under the "Act to authorize the conveyance of real estate of minors in certain cases," approved February 28th, 1840, should set forth fully all the facts and circumstances rendering a sale, or other disposition of the minor's property, necessary; that the Court may judge of the necessity and fitness of the measure. *Dorr, petitioner, &c.*, 145

2. A guardian should not make an absolute sale of the real estate of his ward, and then apply to the Court to authorize him to do what he has already bound himself to do; and the Court will not ratify such agreements. The

GUARDIAN AND WARD.—*Continued.*

proper course is to obtain leave of the Court in the first instance. *Id.*, 145

3. No decree will be entered against an infant on a bill taken against him as confessed, or on the answer of his guardian *ad litem*, admitting the facts stated in the bill. The answer, in such case, is regarded as a pleading merely, and cannot be used as evidence for, or against, the infant, against whom the complainant must prove his case. *Thayer* v. *Lane*, 200

4. Where money was directed to be paid into Court, under a decree, for an infant, and her guardian accepted a deed of lands in lieu thereof, *it was held*, that it was not binding on the infant; and that the guardian had no right to receive the money, much less land in lieu of it. *Westbrook* v. *Comstock*, 314

5. This Court has general supervisory power over the persons and estates of infants; and, when any part of an infant's estate is in litigation here, it is under the immediate guardianship and protection of the Court; and, where money belonging to an infant is ordered to be paid to the register, neither the guardian *ad litem* nor general guardian of the infant has any right to receive it. *Id.*, 314

6. Before this Court will order money to be paid to a guardian, it must be satisfied that he has given sufficient security for the performance of his trust, and that he has not abused it. *Id.*, 314

HUSBAND AND WIFE.

1. A legacy to a married woman is liable to an attachment issued against her husband; but the attaching creditor must take it subject to her equity, which is to have the whole, or so much as the Court may see fit, set apart to her for her support. *Westbrook* v. *Comstock*, 314

2. In a plea that one of the defendants is a married woman, and her husband is not a party to the suit, it is not necessary to show by the plea she cannot sue and be sued as an unmarried woman, under the eighteenth section of chapter four, title seven, part two, of the revised statutes, where the bill does not make out a case bringing her within the statute. *Parker* v. *Parker*, 457

3. A settlement after marriage, on a wife, of property belonging to her before marriage, in pursuance of an antenuptial parol agreement, is good against creditors. *Wood* v. *Savage*, 471

4. Where the property was money, and was to be invested by the husband, whenever a favorable opportunity offered, in the purchase of real estate in the wife's name and for her benefit, and the money was used by the husband in his business without the wife's consent, and was not laid out in pursuance of the agreement until after the expiration of two years, the conveyance to the wife was held to be good against the creditors of the husband. *Id.*, 471

5. All voluntary postnuptial settlements are not necessarily bad. They are

HUSBAND AND WIFE.—*Continued.*

good when made without fraud, by a party not indebted at the time, or whose debts are trifling compared with his property. *Beach* v. *White*, 495

6. Conveyances of real estate made after marriage for the purpose of vesting the title in the wife, the husband being at the time insolvent, were held fraudulent and void, not only against existing, but subsequent creditors. *Id.*, 495

IDENTITY.

See TREATY.

INFANT.

See GUARDIAN AND WARD

INJUNCTION.

1. On a motion for an injunction, the statements in the bill must be taken as true; and the relief sought must be consistent with the case made by the bill. *Michigan State Bank* v. *Hastings*, 9

2. The general rule is, that an injunction will be dissolved where the equity of the bill is met, and full and clearly denied by answer; which must, however, for this purpose, be positive, and full and satisfactory to the Court. *Attorney General* v. *Oakland County Bank*, 90

3. The granting and continuing of injunctions rest in the discretion of the Court, and there are exceptions to the rule above stated. *Id.*, 90

4. If, by a dissolution of the injunction, the complainant is likely to be deprived of all benefits he might otherwise derive by succeeding in the suit, it will not be dissolved as a matter of course, on the coming in of the answer denying the equity of the bill. *Id.*, 90

5. An injunction will not be dissolved on an answer admitting the equity of the bill, and setting up new matter as a defense. *Id.*, 90

6. The Court of Chancery may stay or prevent nuisances by injunction, and the complainant will not be first required to establish his right at law, unless doubtful, and in dispute. *White* v. *Forbes*, 112

7. A perpetual injunction was granted to prevent the erection of a dam, which would have flooded the lands of complainant, on the grounds of injury to the property, and the probability that disease would be generated by the overflowing of the water. *Id.*, 112

8. When complainant had stood by, without objecting, and allowed defendant to go on and expend a considerable amount of money in the erection of a mill, in violation of the terms of a grant made by complainant, in consideration of the erection of the mill, of the right to use the water of a creek in a particular manner, it was *held*, that, by his silence, he had waived all

INJUNCTION.—*Continued.*

right to relief in equity, by injunction, against diverting the water. *Jacox* v. *Clark*, 249

9. Courts of equity restrain proceedings at law, when necessary to the attainment of justice, not by assuming jurisdiction over the Courts in which the proceedings are pending, but by controlling the parties to such proceedings by injunction. *Burpee* v. *Smith*, 327

10. An application by a party or privy to a proceeding in this Court, to stay such proceeding, must be directly to the Court itself, in the matter of the suit or proceeding, for an order to that effect; and an officer out of Court has no authority to allow an injunction for that purpose. But where the case was such that an order would have been granted, and the objection was not taken on the argument, the injunction was allowed to stand for such order. *Mason* v. *Payne*, 459

11. Where complainants had agreed to allow defendants to draw water for running a mill from a certain lake, the outlet of which flowed through complainants' lands, and had suffered them to go on and construct a mill and race at an expense of three thousand dollars, before informing them they did not intend to abide by their promise, an injunction, which had been granted to restrain the taking of the water of the lake for the mill, was dissolved. *Payne* v. *Paddock*, 487

12 Where the bill prays an injunction, but it is omitted in the prayer for process, it is a good ground for refusing an injunction, but not for dissolving it when it has been allowed. *Taylor* v. *Snyder*, 490

13. Where complainant, after a statutory foreclosure of a mortgage, filed his bill in this Court to foreclose the same mortgage, alleging the statutory foreclosure to have been invalid, and obtained an injunction, it was dissolved on the ground that he had no longer any interest in the mortgage or mortgaged premises, and that the purchaser at the sale, or his grantees, should have filed the bill. *Gilbert* v. *Cooley*, 494

14. Where an injunction had been granted, enjoining defendant from interfering with, or encumbering certain lands and premises, and defendant, at and previous to the granting of the injunction, being in possession of, and claiming title to, a mill on the land, forcibly put out two agents of the complainant who came into the mill after the injunction had been served, and refused to leave when requested, it was held to be no violation of the injunction, which was not intended to dispossess the defendant. *Hemingway* v. *Preston*, 528

See Corporation, 4.

INTEREST.

See Bank, 4. Usury, 1, 2.

IRREGULARITY.

Irregularities in a sale, under an execution, must be corrected by applying to the Court out of which the writ issued, to set the sale aside. There must be fraud to give this Court jurisdiction; irregularity is not sufficient. *Carenaugh* v *Jakeway*, 344

See JUDGMENT CREDITOR'S BILL, 21.

JUDGMENT AT LAW.

It is well settled that a Court of Chancery will relieve against a judgment at law, where complainant was prevented from making his defense at law by the fraudulent conduct of the defendant. *Burpee* v. *Smith*, 327

See INJUNCTION, 9.

JUDGMENT CREDITOR'S BILL.

1. A judgment creditor, who files a bill to have his judgment satisfied out of choses in action belonging to his de tor, must show, 1st, A judgment; 2d, An execution sued out on such judgment; and 3d, A return of the execution unsatisfied in whole or in part; and unless these facts appear affirmatively in the bill, this court has no jurisdiction of the case. *Smith* v. *Thompson*, 1

2. An execution cannot be legally returned until the return day thereof; and where an execution was returned May 17th, when it was returnable on the 18th, the return was held to be insufficient to authorize the filing of a creditor's bill. *Id.*, 1

3. Where a judgment creditor's bill is verified under the 110th rule, by the complainant's agent, who is not also solicitor of the complainant, the jurat should state the person verifying to be the agent of the complainant; but where it is verified by the oath of the complainant's solicitor, the Court will take notice of that fact from the records and proceedings in the cause. *Bergh* v. *Poupard*, 5

4. There are two classes of cases in which a judgment creditor may come into Chancery for relief. 1st, In aid of his execution at law. 2d, To have his judgment satisfied out of *choses in action*, or other property of the debtor not liable to execution. *Williams* v. *Hubbard*, 28

5. In the first class of cases, he must show that an execution has been issued, but it is not necessary to show that it has been returned. *Id.*, 28

6. In the second class, the bill must show that an execution has been issued and returned unsatisfied, in whole or in part; and this should be shown by the officer's return. *Id.*, 28

7. An officer's return, to be sufficient for this purpose, must be such as, if untrue, would render him liable for a false return. *Id.*, 28

JUDGMENT CREDITOR'S BILL.—*Continued.*

8. A return of an execution unsatisfied by direction of the party suing it out, is not sufficient for this purpose. *Id.*, 28

9. A judgment creditor's bill may be filed for the double purpose of aiding an execution, and reaching property which is not subject to execution. *Id.*, 28

10. A judgment creditor who comes into this Court for relief, must show that he has in good faith exhausted his remedy at law. This is usually done by showing an execution issued to the county where the debtor resides, returned unsatisfied in whole or in part. *Freeman* v. *Michigan State Bank*, 62

11. Where debtor had property in another county, which, before the return day of the first execution, he offered to complainant to be levied upon, *held*, the complainant should have caused his execution directed to the sheriff of the debtor's county to be returned, and sued out an *alias* execution into the county where the property was situated. *Id.*, 62

12. The execution to the debtor's county may, for this purpose, be returned at any time; and it is not necessary to wait until the return day. *Id.*, 62

13. The filing of a judgment creditor's bill, without answer or the appointment of a receiver, creates no lien upon the debtor's property; and complainant, upon defendant's decease in such case, loses his right to prosecute the suit. *Jones* v. *Smith*, 115

14. Where plaintiff's attorney instructed the sheriff not to levy on real estate, and on the return of the execution unsatisfied filed a judgment creditor's bill, and obtained an injunction, the injunction was dissolved on a plea of the defendant stating the instructions given to the officer, and that defendant offered to turn out real estate to be levied on, when called on by the officer with the execution. *Wharton* v. *Fitch*, 143

15. The return of an execution unsatisfied, is conclusive between the parties to a judgment creditor's bill, when the return is good on its face, and has not been made by collusion between the creditor and officer, or by direction of the creditor. *Albany City Bank* v. *Dorr*, 317

16. An execution creditor is not bound to point out property to be levied on; he has done all that the law requires of him, when he has placed his execution in the hands of the sheriff, whose duty it is to make the money. *Id.*, 317

17. Where a judgment creditor's bill was filed on an execution returned unsatisfied nearly nine years before, a motion for the appointment of a receiver was denied. *Gould* v. *Tryon*, 353

18. An execution must be returned within a reasonable time before the filing of a judgment creditor's bill, and nine years is not a reasonable time. *Id.*, 353

19. The examination of a defendant to a judgment creditor's bill, under an order entered in pursuance of the 111th rule [105 of the new rules] is not confined to defendant's property or effects, but extends to any matter which

JUDGMENT CREDITOR'S BILL.—*Continued.*

he would be required to disclose by answer; and authorizes the examination of witnesses on any matter charged in the bill, and not admitted by defendant on his examination before the Master. *Hoard* v. *Palmer*, 391

20. Where a special motion was made for an order for a receiver under a judgment creditor's bill, and defendant had notice, but failed to appear or oppose the motion, *it was held*, that the fact of a demurrer having been filed was no objection to granting the order in such case, and that the defendant, if he meant to insist upon it, should have interposed his objection on the hearing of the motion, that the Court might look into the case and decide whether it was well taken. *Id.*, 391

21. Irregularity in the appointment of a receiver under a judgment creditor's bill is no ground for defendant's objecting to submit to an examination concerning his property and effects. *Id.*, 391

22. The assignor of a judgment, or *chose in action* on which a judgment has been obtained in the name of the assignor, is not a necessary party to a judgment creditor's bill filed by the assignee. *Morey* v. *Forsyth*, 465

23. But where there is a controversy between the assignor and assignee, touching the assignment, the Court will direct the assignor to be made a party for the protection of all. *Id.*, 465

24. A judgment creditor's bill cannot be sustained to reach equitable assets or choses in action, where the execution was returned before the return day. *Beach* v. *White*, 495

25. But where the bill asks to have certain conveyances set aside as fraudulent, it may be sustained for that purpose. *Id.*, 495

26. The assignor of a judgment is not a necessary party to a bill filed by his assignee on the judgment, unless there is a controversy between them, which makes it necessary for the protection of the defendant; although there is no objection to making him a party. *Id.*, 495

JURISDICTION.

1. A State may sue, but it cannot be sued in its own courts; and, where the nominal defendant was the late Auditor-General of the State, and the complainants' bill sought to reach property conveyed to, and held by him, in his official capacity, *it was held*, that the State was the real party defendant, and that the Court had no jurisdiction of the case. *Michigan State Bank* v. *Hastings*, 9

2. Where relief has been refused to a party in this Court on account of the illegality of a transaction, the Court will not aid him at law. *Welles* v. *River Raisin & Grand River R. R. Co.*, 35

3. To give this Court jurisdiction, where recovery is sought of the amount of a lost note, it is not necessary that it should have been lost before due. *Green* v. *Stone*, 109

JURISDICTION.—*Continued.*

4. Where the aid of this Court is sought to protect the enjoyment of property, it will not be governed by the mere value of the property, but will interfere if the injury will materially lessen the enjoyment of it by the owner. *White* v. *Forbes*, 112

5. Where parties are trying the right to lands at law, and the title of defendants at law is a legal and not an equitable title, with nothing to prevent their establishing it as fully at law as in a court of equity, this Court will not interfere, but will leave them to establish their defense at law. *Stockton* v. *Williams*, 120

6. Where the defendant in such case, instead of demurring, submits to answer, and does not in his answer insist on the objection as a bar to the jurisdiction of the Court, and proofs are taken in the cause, it is too late to raise the objection at the final hearing. *Id.*, 120

7. The Supreme Court has no original equity jurisdiction and cannot act upon any facts which do not constitute a part of a case appealed from, and leave to amend can only be granted by the Court where the cause originated. *Bank of Michigan* v. *Niles*, 398

See Condition, 2. Corporation, 4. Guardian and Ward, 5. Injunction, 6, 9. Judgment at Law. Judgment Creditor's Bill, 4. Treaty.

LACHES.

1. The ignorance of a party of his defense at law is not a sufficient reason to warrant the Court in interfering with a judgment, where such ignorance is connected with negligence, and might have been removed by the use of ordinary means to obtain the necessary information. *Wixom* v. *Davis*, 15

2. A neglect to apply for a receiver within a reasonable time, is construed into waiver of the right to make such application. *Brown* v. *Chase*, 43

3. Where a bill, asking, among other things, relief against a note, was filed within three years and a half from the time it was given, and within six months after it became due, *it was held*, that the delay was not unreasonable, and was no ground for refusing relief. *Schwarz* v. *Wendell*, 267

4. When any party wishes to set aside the proceedings of his adversary for a mere technical irregularity, he must make his application at the first opportunity; and a defendant who has not caused his appearance to be entered, is entitled to no more indulgence than one who has appeared. *Johnson* v. *Johnson*, 309

5. Where complainant had allowed the time given by the rules of Court to take testimony to expire, without showing any excuse for neglect, except that his counsel were occupied with other business, the motion was denied. *Thayer* v. *Swift*, 384

LANDS AND LAND TITLES.

1. A complainant under the act of 1840, must show a *complete* title in himself, or a right to such title, before he can call upon a defendant to release. *Stockton* v. *Williams*, 120

2. By the treaty made at Saginaw, September 24th, 1819, the individual reservees obtained a legal title to the lands reserved, which attached as soon as the lands were located, and required no further action to complete it. *Id.*, 120

3. The title to lands may pass by act of Congress, or treaty stipulation, as well as by patent. *Id.*, 120

4. By the Saginaw treaty, the Indian title to the reserved lands did not pass to the United States; but the treaty operated as a release both by the Indians and the government, of all interest which either had in the lands reserved to the respective reservees in fee simple. *Id.*, 120

5. Under the act of Congress of March 3d, 1807, entitled, "An act regulating the grants of land in the Territory of Michigan," which provides, that the fee simple of every tract or parcel of land that was settled, occupied and improved, prior to the first day of July, 1796, should be granted to the person or persons in the actual possession, occupancy, and improvement thereof;—*it was held*, that the act recognized no right in claimants but that of occupancy or possession, as the stock in which the fee was to be ingrafted; and that where three brothers, on the death of their father, claimed a tract of land under a "substitution," or a kind of entailment, by which the land belonged to the eldest son his lifetime, and after his death to the second son his lifetime, &c., the eldest son, under the claim set up by the brothers, being entitled to the occupancy or possession in his own right, to the exclusion of his brothers, was also entitled to the fee simple in his own right, under the act of Congress; and that, having presented his claim, and procured its allowance, and obtained a patent for the land, there was no resulting trust in favor of his brothers. *Chene* v. *Bank of Michigan*, 511

See Acknowledgment. Adverse Possession. Deed. Registry, 2, 3, 4. Vendor and Purchaser, 1, 2, 3, 5.

LEASE.

See Construction, 7, 8.

LEGISLATIVE COUNCIL.

See Corporation, 1.

LIEN.

When two persons have a lien on the same piece of property which is not

LIEN.—*Continued.*

sufficient to satisfy both, and one has a lien for his debt on another piece of property, he must exhaust the latter before he can resort to the common fund. *Trowbridge* v. *Harleston*, 185

See JUDGMENT CREDITOR'S BILL, 13.

MASTER IN CHANCERY.

See PRACTICE, VIII.

MICHIGAN STATE BANK.

1. The commissioners appointed to settle with the Michigan State Bank, under the act of February 1, 1840, had no right to bind the State to pay any debts of the bank. *Hammond* v. *Michigan State Bank*, 214
2. Where the Michigan State Bank made an assignment to the commissioners appointed on behalf of the State to make a settlement with it, on condition that the State should indemnify and save harmless the bank from certain liabilities, and the commissioners thereupon released the bank from all its liability to the State, and the State refused to accept the condition, (which the commissioners were not authorized to make,) and caused a bill to be filed to recover possession of a part of the property assigned, and for an account, and was demurred to, for want of equity, the demurrer was overruled; and it was *held* that the State acquired by the assignment, a right to the property, notwithstanding the rejection of the condition. *Id.*, 214

MISTAKE.

1. Where a bill was filed to correct a mistake in the description in a deed, of land which had been surveyed and located, *but it was not sought to change the location*, and T. held a lot described in his purchase deed as bounded by such land, held that he need not be made a party, as his interests would not be affected by the decree. *Norris* v. *Hurd*, 102
2. Where a lot which had been surveyed, located, and platted on a diagram, was sold by an erroneous description, but the purchaser and all succeeding holders occupied it as marked out by the survey, a decree was made to correct the mistake, and releases were ordered to be made between the parties whose lands were affected by the erroneous description, to make their lots conform to the location. *Id.*, 102
3. A mistake in a deed, or other written instrument, when proved to the satisfaction of the Court, is a good ground for refusing relief to which complainant would otherwise be entitled. *Garlinghouse* v. *Dixon*, 440

MORTGAGE.

I. *General principles concerning mortgages and the rights acquired under them.*

517

MORTGAGE.—*Continued.*

II. *Proceedings on foreclosure in Chancery.*
III. *Assignments and the rights of assignees.*
IV. *Registry.*
V. *Redemption of mortgaged premises.*
VI. *Foreclosure under power of sale.*
1. *General principles concerning mortgages and the rights acquired under them.*

1. The legal title to lands mortgaged is in the mortgagee, who may, at any time after default, if not before, unless the mortgage provides that the mortgagor shall retain possession, put him out by ejectment. *Stevens* v. *Brown*, 41

2. See, however, the note to the same case, on p. 42, for a subsequent statutory provision, altering the law on this point.

3. A security is presumed sufficient, until the contrary is shown. *Brown* v. *Chase*, 43

4. Where S. held a judgment against C., and C. executed a deed to H. as trustee, authorizing him, in case the debt was not paid in six months, to sell the land, it was *held* that the deed was a mortgage, and to bar the equity of redemption, it should have been foreclosed at law, or by bill in this Court. *Comstock* v. *Stewart*, 110

5. The Court of Chancery will not prevent a mortgagee from taking possession of mortgaged premises, or, if he is in possession, deprive him of it, so long as there is anything due on the mortgage. *Schwarz* v. *Sears*, 170

6. Where a person mortgages lands which he holds under a bond for a deed, he conveys thereby no legal interest in the bond, but only an equitable interest, and the registry of such mortgage is notice to no one. *Wing* v. *McDowell*, 175

7. Where A. was pardoned, on condition he should secure the payment of a fine of $1,000 to the county, and the county commissioners took a mortgage to themselves instead of the county, the mortgage was held to be good, and the commissioners were declared trustees for the county, the law implying a trust from the nature of the transaction. *Rood* v. *Winslow*, 340

8. Where, in a conditional pardon, the person pardoned was ordered to secure the payment of $1,000 to the county, and the county commissioners obtained a mortgage for $1,150, the mortgage was held good for the $1,000, and void as to the residue. *Id.*, 340

9. Anything done by a first mortgagee to the prejudice of a second mortgagee with a knowledge of the second mortgage, should, to the extent of such injury, postpone the first to the second mortgage. *Bailey* v. *Gould*, 478

10. Where the holder of a mortgage released a note which was given with it, reserving at the same time his right to foreclose the mortgage on the land, and a second mortgagee, with notice of the first mortgage, had, prior to the release, foreclosed his own mortgage at law, and purchased the prem-

MORTGAGE.—*Continued.*

ises, the latter was held to stand in the place of a purchaser of the equity of redemption subject to the first mortgage, and the premises in his hands, as such purchaser with notice, to be the primary fund for the payment of the first mortgage. *Id.*, 478

11. A mortgage given by a fraudulent grantor to a creditor, to secure the payment of a judgment, is good against the fraudulent grantee, and all claiming under him with notice of the fraud. *Fox* v. *Clark*, 535

12. It is also good against a creditor of the fraudulent grantor, who has had the assignment set aside, but who had acquired no lien on the property for his debt prior to the mortgage. *Id.*, 535

II. *Proceedings on foreclosure in Chancery.*

13. The petition under 117th section, (R. S. 376,) should set forth briefly all the facts necessary to enable the mortgagor, as well as the Court, to understand its object. *Albany City Bank* v. *Steevens*, 6

14. A copy of the petition, with a notice of the time of presentation to the Court, must be served on the mortgagor, in order to afford him an opportunity to show cause why the prayer of the petition should not be granted. *Id.*, 6

15. Where the service cannot be made on the mortgagor, by reason of his absence from the State, it may be made on his solicitor. *Id.*, 6

16. A copy of the petition need not be served on defendants made parties as subsequent incumbrancers. *Id.*, 6

17. Before appointing a receiver to take charge of mortgaged premises, in a suit for the foreclosure of a mortgage, the Court must be satisfied, *first*, that the premises are insufficient to pay the debt; and, *second*, that the party personally liable is insolvent, so that an execution for the balance due after sale would be unavailing. *Brown* v. *Chase*, 43

18. A writ of assistance will be granted to put the purchaser of mortgaged premises in possession, if the defendant, on being shown the Master's deed, and a certified copy of the order confirming the sale, under the seal of the Court, refuse to deliver possession. *Hart* v. *Linsday*, 144

19. The English doctrine of tacking mortgages has not been adopted in this country. *Wing* v. *McDowell*, 175

20. Under the statute regulating the terms on which non-resident defendants, in mortgage cases, are permitted to appear and defend, two things only are required of the defendant, viz: his appearance before the mortgaged premises are sold on the decree, and the payment of such costs as the Court shall award. The costs only are left discretionary with the Court, and, on the payment of them, defendant has a right to interpose a defense. *Bailey* v. *Murphy*, 305

21. The statute extends to all defendants who are non-residents, and makes

MORTGAGE.—*Continued.*

no distinction between mortgagors and subsequent incumbrancers. *Id.*, 305

22. No proceeding can be had on a bill for the foreclosure of a mortgage, if it appear that any judgment has been obtained on a suit at law for the money demanded by such bill, or any part thereof, unless, to an execution against the property of the defendant in such judgment, the sheriff shall have returned the execution unsatisfied, in whole or in part, and that defendant has no property to satisfy the execution except the mortgaged premises. *Dennis* v. *Hemingway*, 387

23. To prevent proceedings on a foreclosure bill, it is not necessary that judgment shall have been rendered on the bond or note accompanying the mortgage, but for the money for which the mortgage was given *Id.*, 387

24. Where a part of mortgaged premises has been aliened by the mortgagor, subsequent to the mortgage, the rule of equity, on a foreclosure and sale, is to require that part of the premises in which the mortgagor has not parted with his equity of redemption, to be first sold; and then, if necessary, that which has been aliened: and, where the latter is in possession of different vendees, in the inverse order of alienation. *Mason* v. *Payne*, 459

25. But where a part of mortgaged premises is conveyed by the mortgagor *subject to the payment of the whole of the mortgage*, that part as between the vendor and vendee constitutes the primary fund for its payment. *Id.*, 459

26. Where a lot of land was conveyed by complainant, subject to the payment of a mortgage on certain other lands, and proceedings were had in chancery to foreclose the mortgage, and the decree became the property of one of the defendants who also purchased the lot on which payment was charged, *it was held*, that such purchase amounted to a satisfaction of the mortgage to the value of the lot so purchased. *Id.*, 459

27. Where a bill is filed to foreclose a mortgage against a non-resident mortgagor, who does not appear, if the mortgaged premises are insufficient to satisfy the debt, the complainant must have recourse to his remedy at law for the balance; and this Court has no power to issue execution thereon. *Lawrence* v. *Fellows*, 468

28. Where a foreclosure bill did not state that anything was due on the note executed with the mortgage, or whether any proceedings had been had at law for the recovery of the debt, it was held to be demurrable. *Bailey* v. *Gould*, 478

29. When a person not a party to the suit, has come into possession of mortgaged premises since its commencement, and refuses to deliver up possession to the purchaser, on production of the Master's deed and a certified copy of the order confirming the sale, a writ of assistance will not be granted, unless notice of the motion, with the affidavit on which it is founded, is served upon him. *Benhard* v. *Darrow*, 519

III. *Assignments, and the rights of assignees.*

30. The assignee of a mortgage takes it subject to all equities existing be-

520

MORTGAGE.—*Continued.*

tween the parties to it, at the time of the assignment. *Russell* v. *Waite*, 31

31. Where a mortgage was given accompanying a promissory note, and they were assigned before due to a *bona fide* endorsee, *held*, that he was not affected by any equities existing between the original parties. It would have been otherwise, if a bond had been given instead of the note. *Reeves* v. *Scully*, 248

32. The assignment of a mortgage, without the debt which it is given to secure, carries no beneficial interest in the mortgage to the assignee, who would hold it subject to the will and disposal of the creditor. *Bailey* v. *Gould*, 478

IV. *Registry.*

33. An agreement in the nature of a defeasance is required by the revised statutes to be recorded, only when it relates to a conveyance, which, on its face, purports to be absolute. *Russell* v. *Waite*, 31

V. *Redemption of mortgaged premises.*

34. When the mortgagor comes with his money to redeem, the mortgagee must account for the profits of the mortgaged premises, of which the crops which he may have appropriated or destroyed, will be considered a part. *Stevens* v. *Brown*, 41

35. The act of 1840, for the foreclosure of mortgages, requires the redemption money of the premises sold to be paid to the register of deeds, and to no other person; and it is his duty, upon such payment, to destroy the deed and pay over the money to the purchaser, his heirs or assigns. *Woodbury* v. *Lewis*, 256

36. The register of deeds has no right to receive anything but money, in redemption of property sold. His powers are limited to receiving the money, and destroying the deed. He is a special agent for these purposes, only, and his acts are not binding on the purchaser, when he exceeds or departs from his authority, without the assent of the purchaser, *Id.*, 256

37. Where a bill was filed to have a deed of mortgaged premises canceled, on the ground that the redemption money had been paid, and it appeared that the register of deeds had received a check for the amount from complainant, it was held to be no payment, and the bill was dismissed. *Id.*, 256

38. The vendee of an equity of redemption stands in the place of the mortgagor and holds the property subject to all incumbrances; and where there were two mortgages, and the mortgaged premises had been sold by foreclosure, at law, on the first mortgage, on the payment of the redemption money by such vendee, and the assignment to him by the purchaser at the mortgage sale of all the interest of the latter in the land, *it was held*, that such vendee could not claim the rights of the purchaser at the sale, for

MORTGAGE.—*Continued.*

the purpose of defeating the second mortgage. *Johnson* v. *Johnson*, 331

39. When a subsequent mortgagee pays the redemption money of the mortgaged premises to the purchaser under the foreclosure of a prior mortgage, he does not succeed to the rights of such purchaser, but stands in the place of the prior mortgagee, the only additional right which he acquires being the right to be reimbursed what he has paid, with interest, on foreclosing his own mortgage. *Id.*, 331

40. When a mortgagor redeems, it should always be construed as a payment, he being personally liable for the debt. But when his vendee redeems, who is not personally liable, and there is an intervening mortgage between the one redeemed by him and his equity of redemption, the same rule should prevail as in case of a redemption by a subsequent mortgagee. *Id.*, 331

41. Where a mortgage of indemnity was foreclosed at law, before the mortgagee had been damnified, the mortgagor was held entitled to redeem. *Thurston* v. *Prentiss*, 529

42. Where W. W. gave a mortgage on land, and the mortgage was foreclosed at law by advertisement and sale under the statute, but, before the redemption expired, he died, leaving a widow, who sold the land to P. D. W. by a warranty deed, in consideration of his paying her $25 and what was due on the mortgage; and P. D. W. redeemed the land under the mortgage sale, by paying what was due, and the heirs of W. W. afterwards brought an action of ejectment against P. D. W. to recover possession of the land: *it was held*, he had a lien on the land for the redemption money paid by him, with interest, less the use and occupation of the premises over and above improvements. *Webb* v. *Williams*, 544

VI. *Foreclosure under power of Sale.*

43. If a mortgagor wishes to test the validity of a statutory foreclosure in this Court, he must file a bill to redeem. He cannot file a bill to set aside the sale, and have the property re-sold, although the mortgagee may have abused the power to sell, and purchased the property himself. *Schwarz* v. *Sears*. 170

44. *Ante* MORTGAGE, 10.

45. Although a statutory foreclosure be irregular, and no bar to the equity of redemption, yet the purchaser at such sale succeeds to all the interest of the mortgagee. *Gilbert* v. *Cooley*, 494

See ASSIGNMENT, 1, 2, 3. EVIDENCE, 7, 9. INJUNCTION, 13.

NAVIGABLE WATERS.

1. Navigable waters are public highways at common law; and the only object of the clause in the ordinance of 1787, relating thereto, was, to secure to

NAVIGABLE WATERS.—*Continued.*

citizens of the Confederated States such rights, in relation to those waters within the territory northwest of the Ohio, as were already possessed by the inhabitants of that territory; and to prevent any tax or duty on persons navigating them. *La Plaisance Bay Harbor Co.* v. *City of Monroe*, 155

2. There is nothing in the ordinance prohibiting the State from improving its navigable waters. *Id.*, 155

3. Where complainants were authorized by their charter to erect works, &c., and improve the harbor of La Plaisance bay, *held*, that the diversion of a river, at a point some distance above its mouth, in the bed of which they had no title, which flowed into said bay, and caused a channel to be kept open through it, created no damage for which they were entitled to compensation. *Id.*, 155

4. The beds of all meandered streams and navigable waters, belong to the State within which they lie; and the riparian proprietor has no right to the land covered, without express grant. *Id.*, 155

NOTICE.

1. A plea of a *bona fide* purchaser without notice, must aver, not only a want of notice at the time of the purchase, but also at the time of its completion, and the payment of the money. The money must have been actually paid before notice. *Thomas* v. *Graham*, 117

2. It is not enough that the party has secured the money; he must have paid it or become bound in such a way that this Court could not relieve him from the payment of it. *Id.*, 117

See EQUITY, PRIORITY OF, 1, 2. VENDOR AND PURCHASER, 1, 3, 4, 5.

NUISANCE.

See INJUNCTION 6.

ORDINANCE OF 1787.

1. The ordinance of 1787, for the government of the Territory of the United States northwest of the River Ohio, is no part of the fundamental law of the State, since its admission into the Union. It was then superseded by the State Constitution; and such parts of it as are not to be found in the Federal or State Constitution, were then annulled by mutual consent. *La Plaisance Bay Harbor Co.* v. *City of Monroe*, 155

2. That ordinance was enacted before the Constitution of the United States, with a view to existing circumstances; and was intended to operate between the confederacy and the territory, as the articles of confederation did between the States. In construing it, the articles of confederation, and not the Federal Constitution, must be looked at. *Id.*, 155

ORDINANCE OF 1787.—*Continued.*

3. By the "permanent constitution and State government," mentioned in the ordinance, is to be understood the establishment of a new government, as a substitute for the territorial one, and a constitution instead of the ordinance; and this substitution was to be not for part, but for the whole of each. *Id.*, 155

See NAVIGABLE WATERS, 1, 2. REGISTRY, 2.

PARTIES.

See JUDGMENT CREDITOR'S BILL, 22, 23, 26. MISTAKE, 1. PLEADING, 1,

PARTITION.

A partition will be decreed according to the equitable rights of the parties. But, to enable the Court to make such decree, their equitable rights should appear from the pleadings. *Thayer* v. *Lane*, 200

PARTNERSHIP.

1. In equity, as between partners themselves, real estate purchased by them with partnership effects, is partnership property, and, on the dissolution of the firm, should be divided as such, each party taking the same share in it as in the personal property, unless at the time of the purchase it was understood to be an individual and not a partnership transaction. *Thayer* v. *Lane*, 200

2. Where the question of partnership arises, not with third persons, but between the parties themselves, the agreement out of which the supposed partnership arises, is to be construed as any other instrument between the same parties. *Bird* v. *Hamilton*, 361

3. Where a party had failed to perform the preliminary conditions, upon the compliance with which a partnership was to be formed, and the other party to the agreement, to enable him to perform, furnished his own capital, and for a short time carried on the business in the name of the proposed firm, *it was held*, that this was no waiver, and could not entitle the defaulting party to the rights of a partner. *Id.*, 361

PLEADING.

I. *Parties.*
II. *Bill.*
III. *Demurrer.*
IV. *Plea.*
V. *Answer.*
VI. *Cross Bill and Replication.*

PLEADING.—*Continued.*

I. *Parties.*

1. When the matter in litigation is *entire in itself*, it is not necessary that each defendant should have an interest in the suit co-extensive with the claim set up by the bill; he may have an interest in a part of the matter in litigation, instead of the whole. *Ingersoll* v. *Kirby*, 65

2. Where complainant had signed a joint and several note with H. and was sued alone, and had judgment rendered against him on the note at law, *held*, that he need not make H. a party to a suit in this Court to restrain proceedings on the judgment at law. *Burpee* v. *Smith*, 327

3. A magistrate before whom a judgment was rendered is not a proper party defendant to a suit brought in Chancery to restrain proceedings on it. *Id.*, 327

4. Where an officer has an execution in his hands, still in force, he is a necessary party to a bill which seeks to restrain proceedings upon the judgment on which it was issued. *Id.*, 327

5. It is a good ground of demurrer to the whole bill that one of the complainants has no interest in the suit, and has improperly joined with others in filing the bill; but there is no such rule in regard to defendants. *Barstow* v. *Smith*, 394

6. In a suit respecting lands, where defendants were described in the bill as heirs of the father, when in fact they claimed as heirs of their mother, *it was held*, that they were properly made parties, as claiming an interest in the property in controversy; and that, if they wished to take the objection that their interest was not properly made to appear in the bill, they should have demurred; and that it was too late to raise it on the hearing, after proofs had been taken, and it appeared to the Court that the proper parties were before it. *Chipman* v. *Thompson*, 405

7. Where a complainant parted with his interest in a mortgage before answer, it was held a good objection to the suit. *Wallace* v. *Dunning*, 416

8. Where F. sold a piece of land by warranty deed to C. and took back a mortgage, and, after his death, the land was advertised to be sold for taxes levied before the sale to C., and the executors and trustees of F. attended the sale for the purpose of purchasing the land, and thereby saving, as they supposed, a foreclosure of the mortgage, but were prevented from doing so by the fraudulent conduct of S., against whom they filed their bill, *it was held*, that C. need not be a party. *Taylor* v. *Snyder*, 490

II. *Bill.*

9. Where a bill is filed for relief, the discovery is ancillary, and a demurrer which is good to the relief is good to the discovery. *Welles* v. *River Raisin and Grand River R. R. Co.*, 35

10. Where a complainant, entitled to discovery only, goes on to pray relief in addition, his whole bill is demurrable. *Id.*, 35

PLEADING.—*Continued.*

11. A complainant cannot demand several distinct things having no connection with each other, of several defendants, by the same bill. *Ingersoll* v. *Kirby*, 65

12. The relief given by the Court must be consistent with the case made by the bill. *Thayer* v. *Lane*, 200

13. To determine whether a bill is multifarious, we must look to the stating part of the bill, and not to the prayer alone; for, if, in his prayer for relief, complainant ask several things, to some of which he may be entitled, and to others not, the bill is not on that account multifarious, but he will, on the hearing, be entitled to that specific relief only, which is consistent with the case made in the stating part of the bill. *Hammond* v. *Michigan State Bank*, 214

14. Different causes of complaint, of the same nature, and between the same parties, may be united in one suit, where the same relief is asked; but where the causes of complaint are dissimilar in their nature, and would require different decrees, it would embarrass, rather than expedite, the administration of justice, to allow them to be united in the same bill. *Hart* v. *McKeen*, 417

15. A bill framed with a double aspect must be consistent with itself. It should not set up different and distinct causes of complaint that destroy each other. *Id.*, 417

16. Where a bill was filed to have a tax sale set aside, *held*, that it was not necessary to offer in the bill to refund the money paid by S. for the tax title fraudulently obtained by him. *Taylor* v. *Snyder*, 490

III. *Demurrer.*

17. A general demurrer will be overruled, unless good as to the whole of the bill. *Williams* v. *Hubbard*, 28

18. Where a defendant who should have demurred to discovery only, demurs to both discovery and relief, his demurrer will be overruled. *Edwards* v. *Hulbert*, 54

19. Where a defendant demurs to discovery and relief, when he should have demurred to discovery only, his demurrer will be overruled. *Burpee* v. *Smith*, 327

20. Where one of several defendants demurs to discovery on the ground that it would subject him to a criminal prosecution, his demurrer should be confined to such parts of the bill as tend to implicate him in the supposed crime. *Id.*, 327

21. A demurrer may be good as to one defendant, and bad as to other defendants. *Barstow* v. *Smith*, 394

PLEADING.—*Continued.*

IV. *Plea.*

22. A plea must rest the defense upon a single point; and a plea containing two distinct points, is bad. *Albany City Bank v. Dorr*, 317

23. A plea must be positive, and not on belief, when it states a fact within defendant's knowledge, or touching his own acts, but when it relates to the act of third persons and not to defendant's own act, it may be on information and belief. *Parker* v. *Parker*, 457

V. *Answer.*

24. Where a bill is filed under a statute, where there is an exception in the enacting clause, it must negative the exception; but, where there is no exception to the enacting clause, but an exemption in a proviso thereto, or in a subsequent section of the act, it is matter of defense, and must be shown by the defendant. *Attorney General* v. *Oakland County Bank*, 90

25. The defense in such case should state facts, and not conclusions of law. *Id.*, 90

26. Where the answer is put in issue, the defendant must prove what he insists on by way of avoidance. *Id.*, 90

27. Where an answer on oath is waived, it must, notwithstanding, be signed by defendant. *Kimball* v. *Ward*, 439

28. When a defendant, who might, by demurrer or plea to the whole bill, have protected himself against a particular discovery, submits to answer the whole bill, he must answer as fully as in any other case. *Gilkey* v. *Paige*, 520

29. When irrelevancy is made a ground for refusing to answer a particular question, or part of a bill, it should appear that an answer to such part would, in no aspect of complainant's case, as made by the bill, be of service to him. *Id.*, 520

VI. *Cross Bill and Replication.*

30. A cross-bill is necessary, where the defendant is entitled to some positive relief, beyond what the complainant's bill will afford him. *Schwarz* v. *Sears*, 170

31. When a replication to a plea is filed, the truth of the plea is the only question to be tried, and if established, it is a bar to so much of the bill as it professes to cover. *Hurlbut* v. *Britain*, 454

See Admissions, 1. Condition, 1. Evidence, 1, 10, 11, 12, 13, 14. Husband and Wife, 2. Mortgage, 28. Notice, 1, 2. Partition.

PRACTICE.

I. *Filing bill and process.*
II. *Motion and orders,*
III. *Amending and dismissing bill.*
IV. *Taking bill pro confesso and opening decree.*
V. *Excepting to answer.*
VI. *Taking testimony, and other intermediate proceedings.*
VII. *Hearing and rehearing.*
VIII. *Reference to Master, Reports and exceptions.*

I. *Filing bill, and process.*

1. Where a petition was not signed by the petitioner, but was verified by an affidavit signed by her, which stated that she had read it, and knew the contents of it, and that it was true, it was held to be a sufficient signature of such petition. *Johnson* v. *Johnson*, 309

2. Where the subpœna was served on the keeper of the State's prison, instead of on the defendant, who was confined therein, the service was held sufficient. *Id.*, 309

3. The service of a subpœna was set aside as irregular, where the copy delivered to the defendant varied from the original, in being tested on the 31st day of October, 1840, instead of 1843. *Gould* v. *Tryon*, 339

II. *Motions and orders.*

4. After a motion has been denied on its merits, it should not be renewed, without leave of the Court, on the same facts, or any new facts which might have been included in the first motion. The party must present all of his case at once, whether he have several grounds or not. *Johnson* v. *Johnson*, 309

5. An order in part erroneous is not void, so far as relates to matters properly contained in it. *Howard* v. *Palmer*, 391

6. Where a plea had been filed to an original bill, and complainant amended his bill, and defendants answered the *amendments*, *it was held*, that the plea was superseded by the amended bill, and a motion to take it from the files for irregularity was denied, the proper motion being to take the answer to the amendments from the files. *Peck* v. *Burgess*, 485

III. *Amending and dismissing bill.*

7. A complainant may, at any time before there has been an interlocutory or final decree in a cause, dismiss the bill of course, on payment of costs. *Seymour* v. *Jerome*, 356

8. Where an interlocutory order had been entered by consent of parties, oper-

PRACTICE.—*Continued.*

ating as an adjudication to some extent on the rights of the parties, the Court refused to allow the complainant to dismiss his bill. *Id.*, 356

9. Where leave is given to complainant to dismiss his bill conditionally, the defendant may, until the condition is complied with, consider the case as in Court or out of Court, at his discretion; and may either proceed in it, or consider it dismissed and apply to the Court to enforce the payment of his costs. *Jerome* v. *Seymour*, 359

10. Where leave had been granted complainant to dismiss his bill on payment of costs, and the order was entered generally without mentioning costs, on application of the defendant, it was ordered to be amended so as to correspond with the terms on which leave to dismiss was granted. *Id.*, 359

11. It is usual on allowing a demurrer for any cause which the Court sees, on the argument, may be obviated by amending the bill, to give leave to amend on paying the costs of the demurrer. But where the Court on the argument cannot see from the facts before it, how the objection on which the demurrer was sustained could be removed, it is necessary for the complainant to apply for leave to amend, by petition setting forth the additional facts sought to be incorporated in the bill. *Bank of Michigan* v. *Niles*, 398

12. Where a petition was presented for leave to amend a bill, by inserting additional facts, after a decree sustaining a demurrer to the bill had been affirmed by the Supreme Court, on the same reasons which had governed this Court, *it was held*, that the application came too late. *Id.*, 398

13. A complainant wishing to amend his bill, must take the first opportunity after being made acquainted with the defects in it, to ask leave to do so. *Id.*, 398

14. Where no answer had been put in to an injunction bill, leave was granted to amend so as to waive an answer under oath, on payment of costs. *Bronson* v. *Green*, 486

IV. *Taking bill pro confesso, and opening decree.*

15. In applications for opening decrees obtained regularly by default, no general rule can be laid down; but each case must, in a great measure, depend upon its own circumstances, and the sound discretion of the Court. *Russell* v. *Waite*, 31

16. Such a decree should be opened only under special circumstances, and to promote the ends of justice. *Id.*, 31

17. After a decree has been entered on a bill regularly taken as confessed, the question of opening it, to let in a defense on the merits, should be brought before the Court by petition, accompanied by the answer proposed to be put in. *Hart* v. *Linsday*, 72

18. A decree regularly entered will not be opened, except under special circum-

PRACTICE.—*Continued.*

stances, and a stronger case must be made for this, than to vacate an order *pro confesso* before decree. *Id.*, 72

19. Where a party defendant has been guilty of gross negligence, a decree will not be opened, neither will a re-taxation of costs be ordered, or sale be set aside. *Id.*, 72

V. *Excepting to answer.*

20. Where a defendant both answers and demurs to different parts of the bill, and the demurrer is overruled, complainant, to obtain a further answer, must except, under the thirty-fourth rule of the Court, to the answer already put in by defendant, within twenty days after the demurrer is overruled. *Bragg* v. *Whitcomb*, 307

VI. *Taking testimony, and other intermediate proceedings.*

21. An agreement between counsel in a case must be in writing, or reduced to the form of an order by consent, pursuant to the provisions of rule 87, in order to be noticed by the Court. *Suydam* v. *Dequindre*, 23

22. Practice in chancery in regard to the impeachment of witnesses the same as at law. *Sawyer* v. *Sawyer*, 48

23. Before the credit of a witness can be impeached by proof of inconsistency in his declarations, a foundation must be laid by questioning him on cross-examination as to his former statements, that he may have an opportunity for explanation. *Id.*, 48

24. Having laid this foundation, a party may proceed without exhibiting articles of impeachment. *Id.*, 48

25. Each party must pay for taking down the cross-examination of his adversary's witness, as well as the direct examination of his own. *Id.*, 48

26. A witness having been examined, after his examination is closed cannot be re-examined as to the same facts without an order of the Court; but he may be as to other facts, or new matter arising out of the testimony of other witnesses. *Id.*, 48

27. Where a time had been set for the examination of one of the defendant's witnesses, and the commissioner and complainant's counsel attended and waited an hour and a half, during which time defendants did not appear with their witness, and complainants then left, refusing to wait longer, *held* that new notice should have been given them; and the deposition of the witness taken after complainants had left, without such notice, was suppressed. *Stockton* v. *Williams*, 120

28. It is the settled practice of this Court in an affidavit of merits, to require the party to state what such merits are. *Thayer* v. *Swift*. 384

29. Where a party applies for leave to take testimony, after the time allowed

PRACTICE.—*Continued.*

by the rules has expired, he must state in his application what he expects to be able to prove by the witnesses he seeks leave to examine. *Id.*, 384

30. A complainant seeking to set aside the rules of the Court, will be compelled to make as strong a case, as a defendant to set aside a default. *Id.*, 384

31. This Court will take no notice of a parol agreement between the solicitors relating to the proceedings in a cause, but require all agreements to conform to the 87th rule. *Brooks* v. *Mead.* 389

32. Where complainant had failed to serve his replication on a defendant, but the latter attended and cross-examined witnesses, it was held to be a waiver of all objections to the replication. *Id.*, 389

33. Where an order to take proofs was duly entered, but notice was not given within the thirty days required by rule 50, and the examination of a witness was objected to before the Master on that ground, his deposition was suppressed. *Bachelor* v. *Nelson.* 449

VII. *Hearing and rehearing.*

34. Where the complainants under the statute of 1840, in order to obtain the decree sought, were required to substantiate their own title, *held*, that the defense of one defendant enures to the benefit of the rest. *Stockton* v. *Williams.* 120

35. A rehearing will not be granted where a party, by lapse of time, has lost his right to an appeal. *Benedict* v. *Thompson.* 446

36. It is not a matter of course to allow a deed to be proved at the hearing, but a satisfactory excuse must be given for the failure to prove it before the Master. *Bachelor* v. *Nelson.* 449

37. The documentary evidence referred to in the 56th rule, has reference to documents which prove themselves. But to entitle a party to use such documentary evidence in any case, there must have been an order entered for taking proofs, to give the opposite party an opportunity of examining witnesses relative thereto, or of introducing countervailing proofs. *Id.*, 449

VIII. *Reference to Master, Report and exceptions.*

38. Where, on a reference to a Master to ascertain the amount due on a mortgage, the mortgagor appeared before the Master, and at first refused to take a part in the proceedings, but after remaining in the Master's office for an hour or more, and before the opposite party had left, offered to prove certain payments on the mortgage, and the Master refused to hear the testimony, on the ground that his report was closed, or that it was then too late, the Court decided that the Master should have heard the testimony offered. *Schwarz* v. *Sears.* 19

39. Where a Master has erroneously refused to receive testimony, a motion should be made for an order requiring him to receive it; and this should

PRACTICE.—*Continued.*

be done immediately, and without waiting for him to make his report. *Id.*, 19

40. The Master should in such case, at the request of either party, make out and deliver to the party requiring it, a certificate stating briefly the facts of the case, and his reasons for rejecting the testimony; that the Court may review his decision with as little delay as possible. *Id.*, 19

41. Exceptions to a Master's report, are proper only where the Master has come to an erroneous conclusion, either of law or fact, on the whole or some part of the evidence before him, touching the subject matter of the reference. *Id.*, 19

42. Practice as to confirmation of Master's report under the eighty-second rule of the Court. *Suydam* v. *Dequindre*, 23

43. Where the proceedings before a Master have been irregular, his report may be set aside for irregularity, on motion. In such case an order should be obtained enlarging the time to except until the motion can be heard and decided. *Id.*, 23

44. Where the Master decides against allowing a claim presented, the proper way of bringing the question before the Court, is by exception to the Master's report. *Id.*, 23

45. 1. If the defendant wishes to controvert any allegations in the bill, he should put them in issue by plea or answer, and neglecting this, he is precluded from introducing evidence for that purpose before the Master, on a reference. *Ward* v. *Jewett.* 45

46. Where a Master erroneously refuses to receive testimony, the proper way to correct it is by motion to the Court for an order compelling him to receive the evidence, and not by excepting to his report. *Id.*, 45

47. The time fixed by the Master for the service of a summons, should be stated in the summons itself, or form a part of the underwriting, where the latter is necessary to inform the party of the object of the hearing; and the underwriting, as well as the summons, should be signed by the Master. *Whipple* v. *Stewart*, 357

48. Where a defendant appeared before a Master at the return of a summons, and objected to his proceeding, on the ground that no time had been fixed for the service of the summons, *it was held*, that such appearance was no waiver of his right to make such objection. *Id.*, 357

49. Where proceedings are to be had under an order of reference to a Master, it is not necessary to serve a copy of such order on defendant with the Master's summons, but he is bound to take notice of it without service. *Id.*, 357

50. The service of a copy of a Master's summons, without showing the original, is bad. *Howard* v. *Palmer*, 391

51. When a Master has commenced proceedings under an order of reference, they should be completed by him; and the party obtaining the order can-

PRACTICE.—*Continued.*

not transfer the proceedings to another Master to be completed. *Bishop* v. *Williams*, 423

52. It is improper for a Master, to perform any official act, as Master, in a cause in which he is solicitor, or partner of the solicitor. *Brown* v. *Byrne*, 455

53. Where a bill for a divorce is taken as confessed, and a reference is had to a Master to take proof of the material facts in the bill, he must report *his opinion* on them, with the testimony taken. *Emmons* v. *Emmons*, 532

54. The object of a reference in this class of cases, is to guard against collusion by the parties; and the Master, in addition to the questions asked by complainant, should examine the witnesses himself, that he may give his opinion understandingly. *Id.*, 532

See Admissions, 2. Appeal. Costs, 2, 4, 5. Election, 2. Guardian and Ward, 3. Injunction, 1, 2, 3, 4, 5, 10, 12. Judgment Creditor's Bill, 3, 19, 20, 21. Jurisdiction, 6. Laches, 4, 5. Mortgage, II.

PRIORITY.

See Assignment, 2, 3. Mortgage, 9.

PROMISSORY NOTE.

1. To cut off the equities of the original parties to a promissory note, in the hands of a third person, the holder must not have received it in payment of an antecedent debt, but he must have parted with something for it at the time, or incurred responsibilities to a third person on the credit of it. *Ingerson* v. *Starkweather*, 346

2. The law does not raise a presumption of non-payment, but of payment when due, unless the contrary is shown by production of the note, or other evidence repelling the presumption of law when the note itself cannot be produced. *Bailey* v. *Gould*, 478

See Jurisdiction, 3. Mortgage, 10, 29, 32.

PUBLIC GRANTS.

See Construction, 5.

RECEIVER.

See Judgment Creditor's Bill, 17, 20, 21. Laches, 2. Mortgage, 17.

REHEARING.

See Practice, 35.

REGISTRY.

1. The registry of an instrument not required by law to be recorded, is notice to no one. *Wing* v. *McDowell*, 175

2. The ordinance of 1787, for the government of the Northwest Territory, does not declare that a deed shall be void, or that the title to land shall not pass by it, unless such deed be recorded. The object of all registry laws is to protect subsequent *bona fide* purchasers, and there is nothing in the ordinance making an unrecorded deed void as against the grantor. *Godfroy* v. *Disbrow*, 260

3. Under the act of June 9th, 1819, it is necessary for a party who wishes to avoid the effect of a subsequent conveyance first recorded, to show that the grantee, in such conveyance, had notice of the prior conveyance when he took his deed, or that he had not paid a good and valuable consideration. *Id.*, 260

4. The presumption is, that a subsequent purchaser, who has got his deed first recorded, is a *bona fide* purchaser without notice, until the contrary is made to appear. *Id.*, 260

See MORTGAGE, IV.

STATUTE OF FRAUDS.

The delivery of possession under an agreement, is an act of part performance. *Weed* v. *Terry*, 501

STATUTES COMMENTED ON AND EXPLAINED.

1. Revised Statutes, p. 378, § 117. *Albany City Bank* v. *Steevens*, 6

2. Revised Statutes, p. 261, § 32. *Russell* v. *Waite*, 31

3. Laws 1843, p. 139, relative to suits in ejectment by mortgagees. *Stevens* v. *Brown*, *note*, 42

4. Laws 1843, p. 7, relative to alimony. *Sawyer* v. *Sawyer*, *note*, *p.* 53

5. Revised Statutes, p. 379, §§ 122, 123, relative to appeals. *Weed* v. *Lyon*, 77

6. Act of June 21st, 1837, relative to proceedings in chancery against corporations. *Attorney General* v. *Oakland County Bank*, 90

7. Laws of 1840, p. 127; act relative to quieting titles to land in chancery. *Stockton* v. *Williams*, 120

8. Act to authorize the conveyance of real estate of minors in certain cases, approved February 28th, 1840. *Dorr*, *petitioner*, *&c.*, 145

9. Ordinance of 1787. *La Plaisance Bay Harbor Co.* v. *City of Monroe*, 155
Godfroy v. *Disbrow*, 260

STATUTES COMMENTED ON AND EXPLAINED.—*Continued.*

10. Acts relative to the Michigan State Bank. *Hammond* v. *Michigan State Bank*, 214

11. Act of March 31st, 1840, relative to the foreclosure of mortgages. *Woodbury* v. *Lewis*, 256

12. Registry act of June 9th, 1819. *Godfroy* v. *Disbrow*, 260

13. Revised Statutes, 373, § 89, relative to foreclosure of mortgages against non-residents. *Bailey* v. *Murphy*, 305

14. Revised Statutes, 377, § 109, relative to foreclosure in chancery. *Dennis* v. *Hemingway*, 387

15. Act of 1840, relative to acknowledgment of deeds by *femes covert*. *Barstow* v. *Smith*, 394

16. Revised Statutes, 379, § 121, relative to chancery jurisdiction of Supreme Court. *Bank of Michigan* v. *Niles*, 398

17. Appraisal Laws. *Benedict* v. *Thompson*, 446

18. Foreclosure against non-residents. *Lawrence* v. *Fellows*, 468

19. Statute of frauds of 1833. *Wood* v. *Savage*, 471

20. Act of Congress of March 3d, 1807, regulating grants of land in the Territory of Michigan. *Chene* v. *Bank of Michigan*, 511

21. Statutes relative to insolvent estates. *Quackenbush* v. *Campbell, adm., &c.*, 525

SUPREME COURT.

See JURISDICTION, 7.

SURETY.

Where a surety, whose property had been levied on, paid a judgment confessed by himself and principal for a usurious loan, with a knowledge of the usury, *it was held*, that he might recover the amount so paid by him, of his principal. *Thurston* v. *Prentiss*, 529

See DEBTOR AND CREDITOR, 3. MORTGAGE, 10.

TESTIMONY.

See PRACTICE, VI.

TREATY.

When a treaty makes no special provision for deciding questions of individual identity, they must be decided by the judicial tribunals of the country. *Stockton* v. *Williams*, 120

See EVIDENCE, 5. FRAUD, 1. LANDS AND LAND TITLES, 2, 3, 4.

TRUST.

1. A trustee is not allowed to deal with the *cestui que trust* as with a third person, and purchases of trust property made by him, will not be sustained, unless the Court is satisfied that he has acted throughout with the most perfect fairness, and taken no advantage of his peculiar relation. *Schwarz* v. *Wendell*, 267

2. The defendant W., a trustee, having an opportunity to make what it was supposed would be an advantageous purchase for his *cestui que trust*, a married woman, of the remaining two-thirds of land of which she owned an undivided third, refused to make it without an equal share of the profits, and, by his advice, and that of her husband, the *cestui que trust* was induced to make a note for $4,000, to raise money for the purchase, which was indorsed by W. and finally paid out of the trust funds; and the husband, March 7th, 1836, without consulting the *cestui que trust*, agreed with W. on her behalf, that he should have half of the profits of the property to be purchased, deducting traveling expenses, &c., attending the same, and if he should not succeed in purchasing, that his expenses should be paid; and W. purchased one of the two-thirds and took a conveyance of it to himself, as trustee. An offer being made for the purchase of one-third, W. advised the *cestui que trust* and her husband to accept it, but they declined; and W. insisting on selling his share, they agreed to purchase from him, and pay him what would be his share of the profits, by assigning a certain bond and mortgage, and giving a note for the balance. When the assignment was drawn up, the *cestui que trust* declined executing it, alleging that she wanted the property for other purposes, and also that an account presented by W. was too high. W. then requested her to set off his share of the land, and appoint another trustee. She then agreed to purchase his share on the conditions previously agreed to, and a new trustee was appointed. In this settlement a note was given by the *cestui que trust* and her new trustee, for $3,980.24, to pay the account which W. had presented for his services. The Court set aside the agreement of March 7, 1836, and the sale by W. to the *cestui que trust*, and decreed that W. should procure the note for $3,980.24, (which he had transferred,) to be canceled, or else that the amount of it, with interest from the day it fell due, should be charged against him in the account to be taken of his trust, and that he should be allowed a reasonable compensation for his services as trustee. *Id.*, 267

3. The agreements of a husband of the *cestui que trust*, in relation to the trust, are not binding upon her. *Id.*, 267

4. A trustee is entitled to a reasonable compensation for his time and services. *Id.*, 267

5. Where the object of a suit is to place trust property in the possession of the trustee, and not to affect the existence of the trust or trust property, the *cestui que trust* is not a necessary party. *Morey* v. *Forsyth*, 465

See Administrator, 1. Agency, 3. Fraud, 1. Lands and Land Titles, 5. Mortgage, 7. Vendor and Purchaser, 2.

USURY.

The effect of usury under our statute is, not to avoid the contract, but to reduce the amount which the usurer is entitled to recover to the money actually loaned, with legal interest. *Thurston* v. *Prentiss*, 529

VENDOR AND PURCHASER.

1. Where a party purchases land in possession of a third person, with a knowledge of the fact, he takes it subject to all equities existing between his vendor and the person in possession. *Rood* v. *Chapin*, 79

2. In equity, a vendee, under a contract for the sale of lands, is considered as a trustee of the purchase money for the vendor, who is regarded as a trustee of the land for the former. The land is in equity the property of the vendee, who may dispose of, or encumber it in like manner with land to which he has the legal title, subject to the rights of the vendor under the contract. *Wing* v. *McDowell*, 175

3. Where the first purchaser is in possession of the premises, and the second purchaser is aware of that fact at the time he purchases, that is sufficient notice to him of the rights of the first purchaser; and he must take the premises subject to all equities existing between his grantor and the first purchaser. *Godfroy* v. *Disbrow*. 260

4. Although a party may not himself be a *bona fide* purchaser, yet, if his grantor was such purchaser, the former is entitled to all his rights, and the protection which the law would give him. *Id.* 260

5. A vendee is chargeable with notice of the contents of a deed to his grantor, through which he claims title. *Mason* v. *Payne*, 459

6. Where defendant received a grant of the right to use certain water power, and dig a race on complainant's land, in consideration of erecting a mill at a certain place where their lands joined, and then built his mill at another place, and diverted the water from complainant's land, *it was held*, that the consideration had failed, and the complainant was entitled to a reconveyance; and defendant was enjoined from setting up his deed in defense of any action for a previous diversion of the water. *Jacox* v. *Clark*, 508

See FRAUD, 2.

VOLUNTARY CONVEYANCE.

Every voluntary conveyance by a parent to a child, is not fraudulent against creditors, but, when made in good faith by way of advancement, and abundant property is retained by the parent to pay all his debts, it is good against existing as well as subsequent creditors. *Cutter* v. *Griswold*, 437

See FRAUD, 11.

WAIVER.

A waiver should not be implied from slight circumstances. *Bird* v. *Hamilton*, 361

See INJUNCTION, 8, 11. PARTNERSHIP, 3. PRACTICE, 32, 38

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